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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1211

OWENSBORO-DAVIESS COUNTY HOSPITAL, a corporation;
CITY OF OWENSBORO, KENTUCKY and
DAVIESS COUNTY, KENTUCKY - - Petitioners

versus

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
I. OPINION BELOW	2
II. JURISDICTION	2
III. QUESTIONS PRESENTED FOR REVIEW	2– 3
IV. STATUTORY PROVISIONS INVOLVED	4
V. STATEMENT OF THE CASE	5–10
VI. REASONS FOR GRANTING THE WRIT	11–34
A. Introduction	11–12
B. There Is a Conflict Among the Circuits on the Interpretation of the Equal Pay Act	12–19
C. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court	19–21
D. The Decision Below Should Be Reviewed Because It Violated Rule 52(a), F.R.C.P.	21–31
E. "Equal Work" Cannot Be Created by Female Employees Performing Work That They Have Been Specifically Directed Not to Perform by Their Employer	31–34
VII. CONCLUSION	35
CERTIFICATE OF SERVICE	36
APPENDIX A—Court of Appeals Decision Below	1a–34a
APPENDIX B—District Court Decision Below	35a–41a
APPENDIX C—Legislative History of Act	42a–51a

AUTHORITIES CITED

Cases:

PAGE

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Brennan v. Prince William Hospital Corporation, 503 F. 2d 282 (4 Cir. 1974), cert. den. 420 U. S. 972 (1975) 12, 16, 19–20, 22, 31

Corning Glass Works v. Brennan, 417 U. S. 188 (1974) 5, 19, 22

Hodgson v. Brookhaven General Hospital, 436 F. 2d 719 (5 Cir. 1970) 20

Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F. 2d 1256 (5 Cir. 1972) . 12, 13–14, 16, 18, 19, 20, 21

Hodgson v. Good Shepherd Hospital, 327 F. Supp. 143 (ED Tex. 1971) 21

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Hodgson v. William and Mary Nursing Hotel, 65 LC par. 32,497, 20 W.H. Cases 10 (MD Fla. 1971) 13, 18, 21, 31

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Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384 (1951) 18

Schultz v. American Can Co., 424 F. 2d 356 (8 Cir. 1970) 19, 20

Schultz v. First Victoria National Bank, 420 F. 2d 648 (5 Cir. 1969) 19, 20

Shultz v. Kentucky Baptist Hospital, 62 LC 32,296, 19 WH 403 (WD Ky. 1969) 21

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BLEED THROUGH

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PAGE

Brennan v. St. Luke Hospital, 72 LC 32,969, 21 WH 392 (ED Ky. 1973) 21

Hodgson v. St. Elizabeth Hospital, 70 LC 32,863, 20 WH 1242 (ED Ky. 1973) 21

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Statutes:

Equal Pay Act of 1963, 29 U.S.C.A. §206(d)(1) and (d)(3) 4, 5

Rule 52(a) F.R.C.P., 28 U.S.C.A. 2, 21

28 U.S.C.A. §1254(1) 3

Miscellaneous:

Congressional Record, Vol. 109, Part 7 (88th Congress, 1st Session) Pages 9194-9218, 9761-9762, 9854, 9941 13

BLEED THROUGH

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No. ———

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CITY OF OWENSBORO, KENTUCKY and
DAVIESS COUNTY, KENTUCKY - - *Petitioners*

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor, - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Owensboro-Daviess County Hospital, City of Owensboro, Kentucky, and Daviess County, Kentucky, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1975.

I

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears as Appendix A hereto at pages 1a-34a. The Appendix to this Petition is hereinafter referred to as PA. The Findings of Fact, Conclusions of Law and Judgment of the District Court for the Western District of Kentucky appear at Appendix B hereto (PA 35a-41a).

II

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 30, 1975. A timely petition for rehearing in banc was denied on December 2, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254 (1).

III

QUESTIONS PRESENTED FOR REVIEW

This is an action by the Secretary of Labor against two political subdivisions of Kentucky which operate a public hospital in Owensboro, Kentucky, claiming violation of an important federal statute, the Equal Pay Act of 1963, hereinafter sometimes referred to as the Act, by paying female nurses aides at an hourly rate less than male orderlies for what the Secretary

BLEED THROUGH

claims is "equal work". There is a conflict among the Circuit Courts of Appeals of the United States in interpreting the meaning of the words "equal work" as used in the Act.

(1) Whether the term "equal work" means *equal work* or substantially identical work as the legislative history clearly sets forth and the Fifth Circuit has held, or does it mean *comparable work* or something less than equal work as the Fourth and Sixth Circuits have held?

(2) Whether the Secretary sustained his burden of proof in the Trial Court by showing that the aides at Owensboro-Daviess County Hospital performed "equal work" to the orderlies on jobs the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions?

(3) Whether the Court of Appeals invaded the province of the Trial Court under Rule 52(a) F.R.C.P., 28 U.S.C.A., by making its own findings of fact on conflicting evidence?

(4) Whether a violation of the Act may be established by proof that an aide sometimes performed catheterizations and catheter irrigations on female patients which require greater skill and responsibility, but which conduct of the aide was in direct disobedience of the hospital employer's express directive prohibiting non-professional employees (aides) from performing those particular aspects of patient care on female patients?

IV

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938 adding the principle of equal pay for equal work regardless of sex. The part of the Act involved here is codified in 29 U.S.C.A. §206 (d) (1) and (d) (3) as follows:

> "(1). No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ."
>
> * * * * * * *
>
> "(3). For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

BLEED THROUGH

V

STATEMENT OF THE CASE

The Secretary of Labor brought this action under the Act in the United States District Court for the Western District of Kentucky to enjoin Owensboro-Daviess County Hospital, a non-profit corporation; City of Owensboro, Kentucky, and Daviess County, Kentucky, from allegedly violating the Act's equal pay provisions by paying male orderlies an average of twenty cents per hour more than female nurses aides for the performance of work at petitioners' hospital which the Secretary contended was "equal" within the meaning of 29 U.S.C.A. §206 (d). The Secretary also demanded damages in the amount of the wage differential due the aides from April 5, 1968, (Appendix before the Sixth Circuit hereinafter referred to as A at pages 6-9).

Trial before the Court without a jury began October 31, 1972 resulting in a decision for the hospital at the close of the Secretary's evidence on the ground that the Secretary failed to sustain his burden of proving "equal work"[1] (A. 302-303). Findings of Fact and Conclusions of Law were entered by the District Judge (P. A. 36a-41a). On the Secretary's appeal to the Sixth Circuit, the District Court was reversed and the case remanded (P A 1a-34a). The Court of Appeals found that most of the District Judge's Findings

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[1]The Secretary has the burden of proof of "equal work" and unequal pay before the burden shifts to the employer to show an exception under the Act, *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (1974).

of Fact were "clearly erroneous" and not supported by the evidence.

The Secretary's discrimination charge as prosecuted was not limited to any department of the four-story, 462 bed general hospital. During the period in question at the trial, April 5, 1968, thru October 31, 1972, the hospital employed between 20 and 38 orderlies and between 163 and 190 aides, the ratio being approximately six to one (A 91).

The different classifications of aides and orderlies have existed for many years (A 28). Several different job descriptions for aides and orderlies were in effect at the hospital during the period in question, five of which were filed in evidence. They reflect differences in duties (A 72-94).

The January, 1972 revised job descriptions for aides and orderlies is a detailed description of the jobs of each. It contains a concise statement of many of the different duties actually performed by the orderlies which required greater skill, effort and responsibility and which were performed under different working conditions (A 80-90). These different jobs had been performed by orderlies for many years, and they included the following:

> ". . . they adjust the flow of the Cytol solution, change the bottle, check for bleeding of TUR patients. They give rectal suppositories. They give urethal suppositories. They retain, set up oxygen cylinders and tents when necessary. Traction is set up all over the hospital, not just orthopedics. The orderlies clean, change the anesthesial

BLEED THROUGH

> supply, such as your oxygen, your gases, your filters; changing dressings on TUR's; planning, scheduling of the orderlies."
>
> * * * * * *
>
> ". . . They were doing these prior to 1972, but just were not listed in the job descriptions . . ." (A 26-28).

The differences in job performance is even more dramatic than is reflected by the job description (A 28, 68-69).

Aides spend substantially all of their time performing routine patient care, requiring nominal skill. When they report to work they are given a worksheet by their unit supervisors, and most of their time is consumed in performing the regular daily tasks listed on the worksheet (A 139-141). They bathe essentially all the patients, make the beds, serve the food trays three times a day, feed patients unable to feed themselves, remove all of the food trays three times a day, take temperature, pulse and respiration of patients as ordered by the physicians, record these matters on the patient's chart as necessary, and answer patient call lights for the numerous errands, requests and personal needs of the patient (A 118-125, 139-142, 150, 154-157, 218-219, 238-241, 249-250, 264-266, 283-285). The aide is assigned to a smaller area of the hospital and a fewer number of patients than the orderly (A 115-118), and the aides work under close and constant supervision of the Registered Nurse (RN) or Licensed Practical Nurse (LPN) in charge of their station (A 133, 262, 291-292).

The orderlies only spend a small portion of their time in routine patient care, such as that which consumes most of the aide's working time (A 116, 124-125). The orderlies are assigned to a much larger working area involving more than one station, an entire floor on some shifts, and occasionally on the 11:00 p.m. to 7:30 a.m. shift there will only be one orderly in the entire hospital (A 253, 275-276). They work at more than one station, and therefore, not under close supervision of any one supervisor (A 64-66, 290-292). They spend substantially all their time performing specific tasks which are assigned to them and which are not the primary responsibility of the aides (A 116, 124-126, 264-266).

The orderies perform many services upon all of the male patients in the hospital which would be embarrassing to the patient, his family, and the aides, if performed by a person of the opposite sex. This includes all care of the penis and scrotum and completing that portion of a bath when necessary (A 24-25, 72-76, 84-90).

The orderlies have always been trained in sterile techniques which require a high degree of skill and responsibility, such as catheterizations and catheter irrigations, and they perform all of these and other sterile techniques upon the male patients (A 42-43, 84-90). If there is any heavy work to be done in the hospital, either involving the lifting and ambulating or transporting patients or moving equipment, it is the orderlies' job to take care of the matter whenever the aides cannot physically handle it (A 72-76, 84-90, 115,

BLEED THROUGH

120). They are responsible for controlling and restraining violent, alcoholic or overdosed patients, and they administer to criminal patients (A 62-63, 84-90, 129-130, 187, 196).

The orderlies are specially trained by physicians to set up and maintain the heavy traction equipment in the 37 bed orthopedic ward of the hospital and wherever else it is needed throughout the hospital (A 54-55, 59, 128, 233). They aid in applying and cut casts when ordered by a physician (A 84-90, 181, 227-228, 234-235).

An orderly must answer emergency calls (referred to as stat calls) throughout the hospital after making his own decision on priorities and to which emergency he will first respond (A 56-57, 130, 213-214, 257, 266-267). This additional responsibility of answering stat calls causes stress and strain, and is hard on an orderly's nerves (A 194).

All post-mortem care in the hospital is performed on females by the aides and on males by orderlies. Working with dead bodies is an unpleasant task, and a different working condition, and it must be performed several times more frequently by orderlies since there are fewer orderlies to handle such male patients as may die at the hospital (A 131-132).

Six orderlies are assigned regularly to X-ray, physical therapy and central supply, but the Secretary introduced no evidence as to what their duties were or that any aide performed duties which constituted "equal work" (A 60-61). Therefore, the Secretary's case seemed to be limited to "floor" orderlies.

The Secretary called certain orderlies as witnesses to ask what they did. Denford Morris testified that on a typical day he would perform from 5 to 7 catheter irrigations taking from 5 to 45 minutes each, and he catheterized male patients 5 or 6 times a day requiring 25 to 35 minutes each (A 172-174, 176-177). These are skilled sterile procedures which the orderlies perform regularly and frequently on all the male patients and which are performed by RN's and LPN's on women patients most of the time (A 152, 206, 242, 267-268, 280). Aides have not been taught catheterization or other sterile techniques since 1968 when several physicians insisted that catheterization of their female patients be performed only by skilled or professional persons, RN's or LPN's (A 34-35). At that time in 1968 the hospital administration ordered that aides would no longer perform catheterizations (A 37-39), but in spite of this, several aides testified that they had on occasion continued to perform a female catheterization (A 110). The order that no aide would perform catheterizations was restated and reconfirmed by the hospital administration in October, 1972 (A 112).

On the basis of the foregoing evidence the District Court dismissed the Secretary's complaint for failure to make out a case of "equal work".

BLEED THROUGH

VI

REASONS FOR GRANTING THE WRIT

A

Introduction

Every health-care facility in the nation, which has not capitulated before the pressure of the Department of Labor, faces a dilemma over what to do about aides' and orderlies' compensation. As employees clamor for needed wage increases across the board, the Department of Labor insists that aides be paid the same rate as orderlies. The rising cost of medical care is a concern of all, and the Equal Pay Act has added to the problem. As a public, non-profit hospital, the petitioner could have given in to the pressure from the Secretary, increased the hourly rate of *all* aides as demanded and passed the increased cost to date of several hundred thousand dollars along to the consuming public, but this did not and does not appear to the hospital's Board of Managers to be in the best interests of the public which it serves.

The hospital was well aware of the historic distinction between aides and orderlies, a distinction in the form as well as substance of the work performed, a bona fide job classification. As the evidence reflected and the District Court found, this case did not involve "equal work", the performance of which required equal skill, effort and responsibility. The record is replete with evidence of dissimilarities in the jobs and greater requirements of effort, skill and responsibilities from

orderlies while aides consume most of their working time performing routine and repetitious tasks under direct orders and close supervision of the professional nursing staff, and the District Court so found. On appeal, the United States Court of Appeals for the Sixth Circuit held essentially all of the District Court's Findings of Fact to be clearly erroneous and reversed.

B

There is a Conflict Among the Circuits on the Interpretation of the Equal Pay Act.

Granting of certiorari is essential to the correct, orderly and fair administration of the Equal Pay Act in accordance with the intent of Congress. The provisions of the Act, which are at issue in this case, have never been construed by this Court, and there is a clear conflict between the Circuits in the meaning of the words "equal work" as used in the Act.

The Fifth Circuit case of *Hodgson* v. *Golden Isles Convalescent Homes, Inc.*, 468 F. 2d 1256 (5 Cir. 1972), is in direct conflict with the Sixth Circuit's holding in the instant case and the holding of the Fourth Circuit case of *Brennan* v. *Prince William Hospital Corporation*, 503 F. 2d 282 (4 Cir. 1974). The Sixth Circuit following the Fourth Circuit adopts the "substantial equality" interpretation of "equal work" and rejects the requirement of "substantial identity" which is demanded by the legislative history of the Act.

This record contains ample testimony of differences between the work of aides and orderlies, and it de-

BLEED THROUGH

mands a conclusion that their work was not "equal" if the correct standard is applied.

The key to interpretation of the words "equal work" as used in the Act is found in the legislative history of the Act wherein the meaning of the words was fully discussed by the sponsors of the bill who repelled attempts to substitute "comparable work" for the more restrictive term "equal work". The Congress never intended to have the Courts make the substitution by misinterpreting the Act, at the suggestion and encouragement of the Secretary, and reach the harsh result arrived at by the Sixth Circuit in the instant case.

In *Golden Isles, supra,* at page 1258, the Fifth Circuit said:

> "The legislative history of the Equal Pay Act underscores the necessity of case-by-case analysis. By substituting the term 'equal work' for 'comparable work,' which was originally suggested, Congress manifested its intent to narrow the applicability of the Act. Cong. Rec. Vol. 19, Part 7 (88th Congress, 1st Sess.), at 8866, 8892, 8913-8917, 9192-9218, 9761-9762, 9854, and 9941. This legislative history is discussed extensively in Hodgson v. William and Mary Nursing Home, 65 L.C. ¶32,497 (M.D. Fla. 1971). It is not merely comparable skill and responsibility that Congress sought to address, but a substantial identity of job functions."

The holding of the Sixth Circuit to the contrary in the instant case is a repudiation of the legislative history.

Ironically, the *Golden Isles'* opinion was affirmed on October 31, 1972, the day trial started in the instant case. In *Golden Isles* the District Court had found that aides and orderlies did not perform "equal work" on the basis of the orderlies performing the following tasks which the aides did not perform:

1. Insertion of catheters on male patients
2. Irrigation
3. Total lifting
4. Setting up traction
5. Returning patients and driving patients
6. Primary setting up oxygen tanks requiring knowledge and skill

Additionally, the orderly is required to "float".

In the instant case the District Court made comparable findings of fact which were virtually identical to those found in *Golden Isles, supra,* that the orderlies performed the following tasks (among others) which the aides did not perform:

1. Catheterization of all male patients five or six times a day
2. Catheter irrigations five to seven times a day
3. Lifting heavy patients and performing work which requires more physical effort and strength than the work of aides
4. Setting up tractions involving extra skill and effort
5. Handling and controlling violent or alcoholic patients

BLEED THROUGH

6. Setting up and putting oxygen in use and doing heavy lifting and transportation of oxygen tanks

Further, the orderly does not work under close supervision and must "float" or move between stations or floors to perform his specialized tasks or to answer stat calls as they arise. Additional differences found by the District Court to exist included:

1. Performance of other sterile procedures on male patients, requiring skill
2. Cutting of casts requiring skill
3. Performance of more post-mortems by orderlies, an unpleasant task
4. Orderlies had less free time
5. The responsibility of orderlies' work caused them more tension and strain

There was testimony to support all the findings of fact of the District Court but the Court of Appeals after *weighing* the evidence in the record found that "critical" findings of fact were clearly erroneous. The Court below said:

> ". . . Moreover, the record shows, contrary to the findings made by the district court, that some aides, as well as orderlies, were trained to do sterile procedures and did them on a regular basis; that aides as well as orderlies lifted heavy patients, restrained unruly ones, and responded to emergency calls; and that aides had less free time than orderlies did. In addition, although the record discloses that as a general rule orderlies and not aides set

up traction and assisted in removing casts, these duties were performed so infrequently that they did not render the jobs of aides and orderlies substantially different. Finally, although orderlies may have, on the average, done more post-mortem work than aides did, this modest difference does not justify the higher wages paid to orderlies" (PA 4a-5a).

After making its own factual findings, the Sixth Circuit then repudiated the legislative history of the Act and the holding of *Golden Isles, supra.* Instead of "substantial identity of job functions" a lesser standard was applied following *Prince William, supra,* thereby essentially establishing for health-care facilities across the country the per se rule of "equal work" for aides and orderlies which has been sought by the Department of Labor and was rejected in *Golden Isles.*

The Sixth Circuit, in the instant case, recognized that the proof included evidence of additional tasks performed by orderlies which were not performed by aides such as cutting casts, care of unruly patients, and greater frequency of performing post-mortem procedures. Even though these constituted differences in the work performed by aides and orderlies the Court held the work was still "equal" by looking at one item and distinction at a time and discounting its importance while refusing to acknowledge that when the whole spectrum of work performed is considered the lack of equality or "substantial identity of job function" is apparent.

BLEED THROUGH

The legislative history of the Equal Pay Act cries out for a reversal of the decision below and a declaration by this Court of the correct interpretation of the Act.[2] It indicates:

(1) The Secretary was specifically precluded from issuing interpretive regulations. The precise language of the Act was to speak for itself.

(2) The House of Representatives rejected a Senate-passed version (H.R. 6060) and specifically rejected the Senate interpretation of the language used and the Senate Report.

(3) House sponsors of Equal Pay bills recognized that the House-passed bill which became law was conservative and limited but voted for it expressing hope that the Senate would make it more liberal. Instead the Senate adopted the House-passed version.

(4) The House adopted an unusually strict measure of proof for the Secretary in the Act and rejected the Senate interpretation in so many words and illustrations.

(5) The Senate accepted completely the House-passed version with only cursory comments and without debate on the differences from the earlier passed Senate bill which was tabled.

On May 17, 1963 the Senate passed S. 1409, its version of the Equal Pay law. On May 23, 1963 the House debated the Senate bill and its own version,

[2]PA 42a-51a, Appendix C, hereto contains pertinent parts of the Congressional Debate on the Equal Pay Act.

H.R. 6060, which was quite different, and rewrote an entirely different bill.

On May 23, 1963 on the advice of its Majority and Minority leadership that there would be no Equal Pay Act in 1963 unless it did, the Senate scrapped the bill which it had passed (S. 1409) and adopted the House-passed bill (H.R. 6060 as amended) without any oral debate and with little comment except that the Senate was capitulating to the House.

This series of events makes the Senate debate significant, not in interpreting H.R. 6060 which it does not do, but in showing complete capitulation, which it does.

The lengthy House debate on the meaning of the Bill by its managers is of the utmost and prime consideration. As Appendix C (PA 42a-51a) we quote from Congressman Goodell (R-N.Y.), Griffin (R-Mich.), Freylinghuysen (R-N.J.), and Thompson (D-N.J.), the managers of the bill on the floor of the House.

In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), this Court held in construing the legislative history of the Miller-Tydings Act that the remarks by the managers or sponsors of a bill in the floor debate should be given great weight in the interpretation of the statute.

Hodgson v. *William and Mary Nursing Hotel,* 65 L.C. par. 32,497, 20 W.H. Cases 10 (MD Fla. 1971), is the only case in which the legislative history of the Equal Pay Act has been considered in detail and is the decision on which *Hodgson* v. *Golden Isles, supra,* relied. The principles enunciated in *Schwegmann Bros, supra,* were followed in *William and Mary, supra.*

BLEED THROUGH

See also *United States* v. *United Mine Workers,* 330 U. S. 258, 279-280 (1947), where the Court deferred to the floor managers' comments for construction of the bill.

When the legislative history of the Act is given the consideration that it is due, it becomes clear that the Fifth Circuit was correct in holding in *Golden Isles, supra,* that the Act requires the Secretary to prove a "substantial identity of job functions" to sustain his burden, and it was not done in this case.

C

The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court.

Except for the Court's decision in *Corning Glass Works* v. *Brennan,* 417 U. S. 188 (1974), which construed a limited question of "working conditions", the Supreme Court has not construed or interpreted the provisions of the Equal Pay Act. The Department of Labor has been successful in having a misinterpretation of the legislative history of the Act adopted by several Courts of Appeal resulting in incorrect interpretation of the Act. In addition to the case at bar, they include *Shultz* v. *Wheaton Glass Co.,* 421 F. 2d 259 (3 Cir. 1970), cert. den. 398 U. S. 905 (1970); *Hodgson* v. *Square D Co.,* 459 F. 2d 805 (6 Cir. 1972), cert. den. 409 U. S. 967 (1973); *Shultz* v. *American Can Co.,* 424 F. 2d 356 (8 Cir. 1970); *Shultz* v. *First Victoria National Bank,* 420 F. 2d 648 (5 Cir. 1969), and *Brennan* v.

Prince William Hospital Corp., 503 F. 2d 282 (4 Cir. 1974), cert. den. 420 U. S. 972 (1975).

The Fifth Circuit later repudiated its holding in *First Victoria National Bank, supra, sub silento* by its decision in *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (5 Cir. 1970), and *Golden Isles, supra.* In *First Victoria National Bank, supra,* the Department of Labor persuaded the Court to adopt an erroneous and false legislative history.

However, the damage was done and the Court of Appeals for the Third Circuit cited and followed *First Victoria National Bank, supra,* adopting its so-called legislative history in *Shultz* v. *Wheaton Glass Co., supra,* and the Eighth Circuit adopted it in *Shultz* v. *American Can, supra. Prince William, supra,* then followed the error.

When *Golden Isles, supra,* was decided in 1972 the conflict in the Circuits became apparent, and even though the Department of Labor had lost the case, it did not seek certiorari. We submit this was not done because it would have resulted in the Supreme Court adopting the proper legislative history and declaring the interpretation of the Equal Pay Act in accordance with *Golden Isles,* the first case in which a Court of Appeals had found the true legislative history.

Instead of seeking clarification from the Supreme Court, the Department of Labor has instead forced countless settlements in cases brought against health-care facilities across the country under the authority of the cases decided because of the adoption of an incorrect, improper and inapplicable legislative history

BLEED THROUGH

of the Act,[3] although in the health-care field it has lost several cases tried in the District Courts.[4]

Unless the meaning of the Equal Pay Act is settled by this Court, confusion will continue to run rampant in the Courts of Appeal as well as the District Courts, and such cost as is incurred by the confusion will be borne by the consuming public.

D

The Decision Below Should be Reviewed Because it Violated Rule 52 (a), F.R.C.P.[5]

There was evidence in the record supporting the decision of the District Court, and the Court of Appeals misconceived its role in retrying the facts of the case, weighing the evidence and concluding in virtually every material instance that the District Court's Findings of Fact were "clearly erroneous". As the Court said in *Golden Isles, supra,* at page 1257:

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[3]Numerous settlements in uncontested cases are reported in the labor law services. Examples of settled cases are *Hodgson* v. *St. Elizabeth Hospital,* 70 LC 32,863, 20 WH 1242 (ED Ky. 1973); *Hodgson* v. *Skyvue Terrace, Inc.,* 68 LC 32,699, 20 WH 754 (WD Pa. 1972); and *Brennan* v. *St. Luke Hospital,* 72 LC 32,969, 21 WH 392 (ED Ky. 1973).

[4]*Brennan* v. *Cenco Hospital & Convalescent Homes Corp.,* 71 LC 32,908, 21 WH 29 (SD Tex. 1973); *Hodgson* v. *Good Shepherd Hospital,* 327 F. Supp. 143 (ED Tex. 1971); *Shultz* v. *Royal Glades, Inc.,* 66 LC 32,548, 67 LC 32,633 (SD Fla. 1971); *Hodgson* v. *William & Mary Nursing Hotel,* 65 LC 32,497, 20 WH 10 (MD Fla. 1971); *Shultz* v. *Kentucky Baptist Hospital,* 62 LC 32,296, 19 WH 403 (WD Ky. 1969); and *Hodgson* v. *Kuakine Hospital,* 73 LC 32,014 (D. Haw. 1974).

[5]F.R.C.P. 52 (a) provides: ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. . . ."

> ". . . The Secretary would have us ascribe our own weight to the factual differences that appear in the evidence, but weighing and evaluating the facts is properly the task of the trial court . . ."

In the decision below the Court accepted the suggestion of the Secretary and retried the case ascribing weight and credibility to the evidence in a totally different way from the District Court.

We submit that the important distinction which the decision below tends to lose cite of is that the Secretary failed in the District Court to meet the burden of establishing by substantial evidence that *any* aide and orderly performed "equal work" on jobs which required equal skill, effort and responsibility and which were performed under similar working conditions. Therefore, the burden imposed on the Secretary by the Act to prove equal work[6] was never met, and the burden never passed to the hospital to prove that an exception applied.

If the Secretary had met his burden, then the hospital would have been required to proceed with its proof and establish that the difference in pay was not based upon sex discrimination but was based upon some other valid exception, such as greater skill, effort or responsibility. Such proof by the hospital would need to be brought forth for every instance where the Secretary had made a prima facie case that *an aide* and *an orderly* performed "equal work".

Specific Findings of Fact held "clearly erroneous" will be discussed.

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[6]*Corning Glass Works* v. *Brennan, supra.*

BLEED THROUGH

JOB DESCRIPTIONS

The Court below held that the District Court's Finding of Fact (9) that the job descriptions for aides and orderlies reflected substantial differences in duties was *clearly erroneous.*

Exhibit 6 to the deposition of Mr. Collins, the Hospital administrator, is a job description for aides prior to 1969 (A 31, 92-94). It shows the routineness and simplicity of the tasks assigned to aides which necessarily filled their work day with jobs requiring a minimal level of skill and responsibility. Furthermore, the job description is substantially different from the earliest orderlies' job description in the record which was in effect as revised in June, 1969 (A 24, 72-76).

The job descriptions of aides and orderlies as revised in 1969 (A 24, 72-79) are substantially different when you consider that the aides' job description *excluded* all sterile procedures associated with catheterization, anchoring foley catheter, bladder irrigations, bladder instillations and catheter irrigations (A 79). Whereas, performance of these sterile procedures on males is included in the orderlies' duties (A 74). Additionally, the orderlies' job description includes several tasks requiring greater effort, skill, or responsibility, such as setting up oxygen equipment, setting up cots, heavy lifting, setting up traction and answering stat calls.

Finally, we come to the 1972 revised job description (A 25-26, 80-90) which contained additional differences.

According to the administrator these different duties had been performed by orderlies for years, as many as 20 years, but simply never had been written up and added to the formal job description (A 27).

The District Court's Finding of Fact was not *clearly erroneous* as the Court below held.

STERILE PROCEDURES

The Court below determined that the District Court's Finding of Fact (13) was clearly erroneous stating that until October 5, 1972, aides performed virtually all catheter irrigation and catheterization of females. The District Court found that almost all catheter irrigations and catheterizations upon male patients were performed by orderlies, but upon female patients these procedures were performed by RN's and LPN's and very rarely, if ever, by aides.

The Court's finding about orderlies performing catheterization and catheter irrigation was based on the direct testimony of orderly, Denford Morris (A 172-177). Further, the Finding of Fact is supported by the testimony of the administrator who stated that all orderlies are trained to perform these sterile procedures and that all the floor orderlies perform them on a regular basis (A 43-44) consuming a considerable amount of their time at work.

As to the aides, they had not been trained in performing sterile procedures since 1968, and they were specifically instructed by the hospital administration in 1968 to stop performing these sterile procedures on female patients because a number of doctors wanted

BLEED THROUGH

sterile procedures performed only by professional personnel. If some of the older aides were performing catheterizations on female patients on an irregular and infrequent basis as the evidence indicated, it was directly contrary to specific orders of the hospital administration, and we submit the infrequent performance of a job requiring extra skill should not create "equal work" especially when performed in defiance of the employer's express directives. The Trial Court's Findings of Fact about the performance of sterile procedures requiring extra skill were not *clearly erroneous.* On the contrary, what is clearly erroneous is the Court of Appeal's determination that aides previously trained to do sterile procedures performed this skilled work on a regular basis until a few weeks before the trial.

STAT CALLS

The Court below held that the District Court's finding (15) that the orderly was required to answer stat or emergency calls upon which not infrequently life itself depended was clearly erroneous.

Mr. Collins testified that an orderly gets stat calls consistently to go from one nursing station to another to get a patient up, to do a bladder irrigation, to give an enema, or to perform some other task (A 56-57). Denford Morris testified that stat calls are where you drop everything else and go and may involve taking a patient to coronary care (A 182-183). There is evidence to support this Finding of Fact of the District Court also, and it was not *clearly erroneous.*

CUTTING OF CASTS

The Court below held that the District Court finding (14) that a typical orderly exercises the skill of cutting casts was clearly erroneous.

Aides do not cut casts (A 80-84, 186, and 234-235). Cutting casts pursuant to the direction of the physician is a job that has been taught to and performed by orderlies for years and not by aides (A 25-26, 86, 181 and 235). The District Court's finding was not *clearly erroneous,* and the cutting of casts is definitely a task requiring the exercise of greater skill.

UNRULY PATIENTS

The Court below held that the District Court's Finding of Fact (18) that the orderly has primary responsibility for the care of unruly patients was clearly erroneous.

The job description of the orderly consisting of duties that the orderlies have been performing for years provides that the orderly has the duty to:

> "16. Assist in restraining patients who are Alcoholics, have delerium tremens, or patients who are in danger of harming themselves or others. Escorts unruly patients from emergency room to their assigned room" (A 85).

The hospital administrator testified that the orderly restrains alcoholics, people on drugs or violent people, that it is the orderlies' responsibility, and that the aides call on the orderlies to do this job (A 62-63).

BLEED THROUGH

The testimony of orderlies, Kenneth Thomasson and Denford Morris, confirmed Mr. Collins' testimony (A 196, 183, 187). Also, Mrs. Bryant, an aide, testified that if an unruly patient on the surgical floor became bad enough, they would call an orderly to restrain him (A 130).

We submit there was evidence again to support the District Court's finding, and it was not *clearly erroneous.*

GENERAL FINDINGS OF TYPICAL ORDERLY'S WORK

The Court below found clearly erroneous the District Court's Finding of Fact (11):

> "The typical orderly . . . spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects."

There is direct evidence in the record supporting this finding even to the extent of specifying the amount of time spent in some of the tasks such as catheterizations and catheter irrigation which is a duty exclusively performed by the orderlies on male patients and which requires a considerable amount of the time in their every day routine. The validity of this finding of fact can only be clearly appreciated when it is placed along side

the preceding finding (10) made by the District Court referrable to what the aides must do with their time to accomplish the jobs assigned to them. The District Court found:

> "(10) The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answer requests for small personal needs."

This is the key to the difference in the jobs of aides and orderlies in the instant case. The aide has a well laid out worksheet of regular and routine, time-consuming duties which must be performed on every shift (A 139-140) and which require only nominal skill.[7] She is directly subject to the unit RN and LPN team leader in her every move (A 56-57) and works under very close supervision (A 133). Therefore, by comparison only minimal responsibility rests on the aides' shoulders (A 291-292). The ratio of aides to orderlies over the period in question is approximately 6 to 1 (A 29, 91). Necessarily, there are fewer orderlies available to do the specialized tasks assigned to them in the 462 bed hospital. They do not have time to perform the

[7]Petitioner does not mean to imply that the aides' work is any less important to the operation of the hospital than the orderlies' work. Petitioner only implies that it is different just like the job of the ward clerk, cook, watchman, or custodian, though essential, is different and therefore not "equal work", and the Secretary cannot sustain the burden that the Act imposes on him.

BLEED THROUGH

routine, unskilled duties which the aides are hired to perform.

The orderlies do not pass out or pick up food trays, feed patients, bathe patients or make beds on a regular basis. This is done by the aides routinely, and it consumes a major part of their time. Various witnesses testified to the time required to pass out the trays, feed a patient, make a bed, and do other routine tasks performed by aides (A 118-120, 140-142, 150, 154-157, 218-219, 238-240, 249-250, 264-265, and 283-286).

Norma Ward, an RN and a Medical Unit Supervisor at the hospital, summarized this distinction between aides and orderlies:

> "Q. I asked her if she could think of any other differences other than what she's stated.
>
> "A. . . . they have just a really regular routine. The Assistant's work is sort of planned for them by us. They have a daily written assignment and orderlies don't have this and it's frustrating to not have a, you know, a definite, set pattern every day; you can't be just real routine; this causes them frustration and us, too" (App. 265-266).

When you add up the time required for the aides' duties mentioned, the answering of call lights for various personal needs of patients, and taking of temperatures, pulse and respiration, you have about consumed all the working time of the aide (A 123-124).

The general distinction in the work of aides and orderlies at Owensboro-Daviess County Hospital as pointed out in the District Court's finding of fact (10)

and (11) shows that their work does not legally constitute "equal work". The District Court's findings are supported by evidence and should not have been found *clearly erroneous* by the Court below.

In *Local Union 984, Int. Bro. of Teamsters, etc.* v. *Humko,* 287 F. 2d 231 (6 Cir. 1961) the applicable rule is stated:

> "Under the provisions of Rule 52 (a), F.R.Civ.P., 28 U.S.C.A., this Court is bound by the findings of fact of the Trial Court unless they are clearly erroneous. In applying this rule in McAllister v. United States, 1954, 348 U. S. 19, 20, . . . the Supreme Court enunciated the following test:
>
> " 'A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," United States v. Oregon State Medical Soc., 343 U. S. 326, 339 . . . United States v. United States Gypsum Co., 333 U. S. 364, 395 . . .' " *Id.* at 237.

We submit that a review of the entire evidence contained in the record in the instant case will leave the Court concluding that no mistake was committed by the District Court in its factual findings or its conclusion that the aides and orderlies at Owensboro-Daviess County Hospital did not perform "equal work".

If the Court below had not repudiated the findings of fact of the District Court by picking and choosing among the available evidence (which included evidence supporting the District Court's findings of fact), the

BLEED THROUGH

Court of Appeals below would have been compelled to affirm the District Court's Judgment that aides and orderlies at Owensboro-Daviess County Hospital do not perform equal work requiring equal skill, effort and responsibility and under similar working conditions.

E

"Equal Work" Cannot be Created by Female Employees Performing Work That They Have Been Specifically Directed Not to Perform by Their Employer.

The Court below, in accord with decisions of other courts, concedes that the performance of such sterile procedures as catheterizations and catheter irrigations requires the exercise of greater skill and responsibility[8] than the other tasks performed by the aides and orderlies and would support a different wage rate if regularly performed by orderlies and if not performed by aides. The District Court's Finding of Fact (13) states:

> "At all times, orderlies have been trained in Sterile Techniques, which requires substantial skill, and includes catheterization, catheter irrigation, rectal suppositories, TUR dressing change, and bladder

[8]In *Hodgson* v. *William and Mary Nursing Hotel* (M.D. Fla. 1971), 65 L.C. par. 32,497, 20 W.H. Cases 10 the delicacy of the procedure of catheterizing a male patient, the skill required, and the responsibility associated with the job is recognized and discussed, and in *Brennan* v. *Prince William Hospital Corporation*, 503 F. 2d 282 (4 Cir. 1974), the Court, noting that the orderlies performed these procedures on male patients but aides did not perform them on female patients, stated that: "The orderly's job therefore does call for the exercise of skill and responsibility which is not required of the aides."

irrigation. Since October of 1968, aides have received no training in Sterile Techniques. A typical orderly in a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon the patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides."

This finding should have been determinative of the appeal and should have resulted in the affirmance of the District Court's Judgment. It was supported by the hospital administrator's testimony (A 43-46), which the District Court as the trier of fact was entitled to believe, and by the testimony of a Registered Nurse and Medical Unit Supervisor, Norma Ward, who stated:

"Q. What are some of the things that you would need an orderly for that you would need him right now?

"A. Well, if a patient was in distress I can think of a reason that I would need him; if he had a full bladder and he needed to be catheterized, I'd need an orderly to do that.

"Q. If it were a female patient who would do it in that situation?

"A. The nurses would.

"Q. And if it's a male patient who does it?

BLEED THROUGH

"A. Why, the orderly does.

"Q. Has that been true for how long?

"A. The orderlies have always done catheterizations.

"Q. Okay; and do the RN's always do it in that situation you've described, always.

"A. Well, we do—now they do, the RN's or the LPN's.

"Q. All right; and before October 1st in that situation where it needed to be done right now, did the RN's or the LPN do it?

"A. Most of the time, but then there have been times when trained nurse assistants that could do it on an infrequent or irregular basis."[9] (A. 267-268)

The hospital stopped teaching aides to perform catheterizations or other sterile techniques in 1968 when several physicians insisted that catheterization of the female patients be performed only by skilled persons, RN's or LPN's (A 34-35). At that time, the hospital administration ordered that aides would no longer perform catheterization (A 37-39), but in spite of this, several aides testified that they had on occasion performed a female catheterization (A 110). The order that no aides would perform catheterizations was restated by the hospital administration in October, 1972 (A 112).

It is recognized by the Circuit Court below that the performance of catheterization on male patients consti-

[9]In the decision of the Sixth Circuit Norma Ward's testimony is erroneously cited for the proposition that aides perform such sterile procedures on a regular basis. Her testimony is to the contrary.

tutes work that requires skill and is a task the performance of which would make the job of orderlies require greater skill than the job of aides. If the catheterization procedure was performed consistently on a regular basis by the orderlies there would not be "equal work" under the Act.

To overcome this apparent distinction in job performance, the Secretary introduced evidence that would warrant a factual conclusion that some aides perform catheterizations on female patients on an infrequent and irregular basis, but this was in direct disobedience of the hospital administration's orders in the matter issued in 1968.

We submit that a Court should not find "equal work" to exist on the basis of an employee performing a job which she has been specifically directed not to perform by her employer. If this were not the law, it would seem that the employee would be allowed to make a case for "equal work" by her own disobedience of her employer's direct orders and usurpation of the work of a fellow employee. This leads to an unfair and unwarranted result as was reached in the Court below, and it should not be condoned by this Court.

BLEED THROUGH

VII

CONCLUSION

This case involves a serious question of the interpretation of a Federal Statute, the Equal Pay Act of 1963. There is a conflict among the circuits in the definition of the principle words of the Act—"equal work". Some of the circuits are following a rule that interprets the Act's language in a manner which conflicts with and effectively repudiates the legislative intent of Congress in enacting the Act. The Supreme Court should grant certiorari, clarify the conflict of the circuits, and declare the meaning of this important federal law.

After granting certiorari the Court should reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit and enter judgment affirming the United States District Court for the Western District of Kentucky which found on an analysis of the facts of this case that the aides and orderlies at Owensboro-Daviess County Hospital did not perform "equal work".

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition were mailed by First Class Mail, postage prepaid, to Hon. Donald S. Shire, Deputy Associate Solicitor, U. S. Department of Labor, Room 4141 Main Labor, 14th and Constitution Avenue, N.W., Washington, D.C. 20210, attorney for the Respondent, and to Solicitor General, Department of Justice, Washington, D.C. 20530; this —— day of February, 1976.

Ronald M. Sullivan

BLEED THROUGH

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APPENDIX A

No. 73-1261

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellant,

v.

OWENSBORO-DAVIESS COUNTY HOSPITAL, a Corporation; CITY OF OWENSBORO, KENTUCKY; and DAVIESS COUNTY, KENTUCKY,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed September 30, 1975.

Before: WEICK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from a judgment determining that appellees' practice of paying higher wages to "male nursing assistants"[1] than those paid to "nurse assistants" who are female does not violate the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1), (3)[2] because the wage differ-

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[1] The titles of "male nursing assistant" and "nurse assistant" are the official designations for hospital personnel commonly known as orderlies and aides respectively.

[2] Section 206(d) of Title 29 provides in relevant part:

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between em-

ential was justified by differences in skill, effort, and responsibility and by dissimilarities in working conditions.[3] This appeal requires us to examine the district court's findings of fact to determine whether they are supported by the evidence, and whether they permit, as a matter of law, its conclusion that male nursing assistants are required to exert substantially greater effort, to employ substantially greater skills, and to assume substantially greater responsibility than nurse assistants.

The action was brought by the Secretary of Labor in the fall of 1971 against the Owensboro-Daviess County Hospital (the hospital), the City of Owensboro, and the County of Daviess to enjoin them from violating the Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (1), (3) by paying higher wages to "male nursing assistants" (orderlies) than are paid to female "nursing assistants" (aides), and to restrain them from withholding payment of past wages due under the Act.

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ployees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

[3] In *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974), the Supreme Court, in defining the term "working conditions," held:

> . . . the element of working conditions encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. [Footnotes omitted.]

BLEED THROUGH

The hospital is a not-for-profit Kentucky corporation located in Owensboro, Daviess County, Kentucky, and is operated by the City of Owensboro and the County of Daviess through an appointed Board of Management. The parties have stipulated that appellees constitute an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that consequently the employees of the hospital are entitled to whatever protection and benefits the Equal Pay Act affords. The period covered by this action, based upon the complaint and by agreement of the parties, is from April 5, 1968, to the date of the commencement of trial, October 31, 1972. The discrimination charged is not limited to any department of the hospital.

During the period covered by this action, the hospital regularly employed approximately 30 to 40 orderlies and approximately 160 to 180 aides. As a general rule, each of the four floors of the 462 bed hospital was divided into four nursing stations and, depending on the shift, two or three "nurse assistants" were assigned to each station and one or two "male nursing assistants" were assigned to each floor.

After the presentation of the Secretary's evidence, the district court, *sua sponte*,[4] directed a verdict for appellees and thereafter made the following findings of fact: (1) that the job descriptions for aides and orderlies revealed substantial differences in duties and that these descriptions accurately portrayed differences in the actual duties performed; (2) that a typical aide, unlike a typical orderly, spent substantially all her time at the hospital in routine patient care; (3) that orderlies,

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[4] The transcript of the trial discloses the following conversation among the court and counsel:

> MR. STEINER: Uh, the Plaintiff closes, Your Honor.
> BY THE COURT: Plaintiff closes?
> MR. STEINER: Yes, Your Honor.
> BY THE COURT: I'll sustain a motion for a directed verdict without argument, and you will redraw your findings — proposed findings and conclusions.
> MR. LOVETT [FOR THE DEFENDANTS]: Yes, Your Honor.
> BY THE COURT: . . . All right, Mr. Marshall; we stand in recess.

unlike aides, received special training in sterile procedures and techniques, in removing casts, and in setting up traction; (4) that aides were closely supervised, while orderlies exercised discretion in performing their duties, particularly in responding to "stat" or emergency calls; (5) that orderlies, unlike aides, were responsible for the care of violent or potentially violent patients; (6) that orderlies, because of their fewer numbers, were required to do post-mortem work more often than the aides; (7) that the orderlies' work was continuous, demanding and tiring, and that the frequent emergency calls caused tension and strain while aides' duties involved much less tension and strain; (8) that orderlies had less time for relaxation during working hours than aides did; and (9) that the orderlies' work was more arduous than that of aides and required more physical effort and strength.

On the basis of these findings, the district court concluded not only that the Secretary had failed to establish that the tasks performed by aides and orderlies were substantially equal, but also that aides and orderlies performed substantially different jobs under substantially different working conditions, and that the duties of a typical orderly required greater skill, effort and responsibility than did the duties of a typical aide. Accordingly, the district court concluded that the higher wages paid to orderlies were justified, and that appellees had not, therefore, violated the Equal Pay Act.

A careful examination of the record convinces us, however, that the critical findings of fact upon which the district court based its conclusions are clearly erroneous. The job descriptions for aides and orderlies did not differ significantly for most of the period covered by this action. Moreover, the record shows, contrary to the findings made by the district court, that some aides, as well as orderlies, were trained to do sterile procedures and did them on a regular basis; that aides as well as orderlies lifted heavy patients, restrained unruly ones, and responded to emergency calls; and that aides had less free time than orderlies did. In addition, although the

BLEED THROUGH

record discloses that as a general rule orderlies and not aides set up traction and assisted in removing casts, these duties were performed so infrequently that they did not render the jobs of aides and orderlies substantially different. Finally, although orderlies may have, on the average, done more post-mortem work than aides did, this modest difference does not justify the higher wages paid to orderlies. /

JOB PREREQUISITES, TITLE, AND TRAINING

The employment prerequisites for the jobs of aides and orderlies were precisely the same during the period in question: (1) a diploma from an accredited high school; (2) good moral behavior; (3) good health; and (4) a recommendation of character. In addition, as we have already observed, in the job description bulletins issued by appellees, the formal titles, "nurse assistants" and "male nursing assistants," are virtually identical except for the designation "male" in the latter. Moreover, aides and orderlies attended the same introductory four week training course and, with one exception,[5] received identical instruction.

At the same time, however, appellees maintained one wage scale for male nursing assistants and another lower scale for nurse assistants. Although both scales provided for higher wages based upon experience, a male nursing assistant begins working and continues to work at a wage higher than that paid to a nurse assistant with comparable experience.[6]

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[5] Aides hired after October, 1968, received no training in catheterization procedures.

[6] The wages received by aides and orderlies during the period of time at issue were as follows:

ORDERLIES

	Min.	3 Mos.	6 Mos.	1 Yr.	1½ Yrs.
11-13-66	$1.30	$1.45	$1.55	$1.60	$1.75
9-14-67	1.40	1.55	1.65	1.70	1.85
9-15-68	1.50	1.65	1.75	1.80	1.95
9-15-69	1.65	1.80	1.90	1.95	2.10

JOB DESCRIPTIONS

Although job descriptions should not be accorded as much weight as that given to the duties actually performed by employees in determining whether two jobs are substantially equal, nevertheless, we believe that they may be helpful, particularly where the descriptions of the jobs to be compared are similar and were written by the very employer who claims that wage differentials are not based on an impermissible criterion.[7] *Cf. Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203 (1974).

	Min.	3 Mos.	9 Mos.
9-27-70	1.85	2.10	2.30
12-19-71	2.00	2.25	2.45

NURSE ASSISTANTS

	Min.	3 Mos.	6 Mos.	1 Yr.	1½ Yrs.	Special	
11-13-66	$1.20	$1.25	$1.30	$1.35	$1.40	$1.48	
9-14-67	1.30	1.35	1.40	1.45	1.50	1.58	
						2 Yrs.	Special
9-15-68	1.40	1.45	1.50	1.55	1.60	1.65	1.70
9-15-69	1.55	1.60	1.65	1.70	1.75	1.80	1.85

	Min.	3 Mos.	9 Mos.	Special
9-27-70	1.70	1.85	2.05	2.10
12-19-71	1.85	2.00	2.20	2.25

	NUMBER OF ORDERLIES	NUMBER OF NURSE ASSISTANTS
9- 2-67	25 including 1 part-time	162
3-31-68	29 including 2 part-time	163
10-12-68	31 including 4 part-time	160
4-12-69	31 including 4 part-time	160
2-14-70	31 including 3 part-time	179
4-11-70	29 including 4 part-time	180
10- 1-71	32 including 4 part-time	180
9-28-72	38 including 8 part-time	180 full-time 10 part-time

One aide who worked in the obstetrics ward of the hospital testified that she received the special pay indicated in the chart. The record does not contain an explanation for her special pay. However, even aides who received special pay were paid wages lower than those paid to orderlies with the same length of employment.

[7] We agree with the Secretary of Labor that "[a]pplication of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance."

BLEED THROUGH

In this case, we observe that in both the January, 1969, and the January, 1972, job description bulletins issued by appellees, the primary duty of a nurse assistant appears virtually identical to that of a male nursing assistant: a nurse assistant "[a]ssists the Professional Nuring Staff by performing duties in caring for patients," while male nursing assistants "[a]ssist the Nursing Staff in performing duties in caring for patients." These bulletins also state that both aides and orderlies are responsible to the professional nursing staff, the former to the unit supervisor of nursing service, and the latter to the charge nurse.

THE 1969 BULLETIN

The detailed job descriptions of aides and orderlies found in the 1969 bulletins are virtually identical, and the differences disclosed are insignificant for the purposes of the Equal Pay Act. According to these bulletins, both aides and orderlies take and record temperature, pulse and respiration; both take blood pressure; both give cleansing and therapeutic baths, and orderlies finish all the baths on male patients; both give enemas; both do sterile procedures including catheterizations, catheter irrigations, bladder installations and irrigations;[8] aides apply hot and cold compresses under supervision, clean and apply colostomy dressings on permanent cases under supervision, and give back care to all patients who are bedridden, while orderlies apply dressings, compresses, or medication to the penis and scrotum, and change colostomies on permanent cases; aides apply hot water bottles and ice bags, while orderlies fill and apply hot water bottles and ice bags; both have post-

29 C.F.R. § 800.121 (1974). Therefore, if there were a conflict between job description bulletins and actual duties performed, the latter would be determinative of the existence *vel non* of a violation of the Equal Pay Act.

[8] It is interesting to note that even though aides hired after October, 1968, received no training in catheterization procedures, the job description bulletin for aides revised in June, 1969, still listed catheterizations as a duty performed by aides. Some time later, this duty was deleted.

mortem duties; both discontinue subcutaneous injections and I.V.'s under supervision; both issue and empty bedpans, and collect urine and fecal specimens; both keep records of a patient's intake and output; both assist in preparing patients for surgery; both report observations and complaints of patients to the nurse in charge; aides are required to insure that all patients are clean and dry before leaving their units, while orderlies are required to make sure that all male patients on the floor to which they are assigned are dry before going off duty; and aides weigh ambulatory patients and assist in weighing bedridden patients, while orderlies weigh bedridden patients.

According to the 1969 bulletins the following differences exist in the jobs of aides and orderlies: aides give perineal care while orderlies do all treatments of the penis and scrotum; aides assist male and female patients with urinals and bedpans while orderlies check for "due-to-voids"; aides assist patients in and out of bed and turn patients who are unable to turn themselves, while orderlies help patients get out of bed, walk them and help to turn them; aides assist in admitting patients to the hospital, transferring them within the hospital, and discharging them from the hospital, while orderlies help to admit male patients and to transfer and discharge patients; aides are required to answer signal lights promptly, while orderlies are required to answer signal lights immediately and to respond to page calls; aides help to start and to discontinue oxygen therapy, while orderlies set up and put oxygen in use when necessary; aides are required to insure that patients have fresh water at all times and to change thermometers for patients staying longer than a week, while orderlies must keep ice carts filled; aides clean the dressing cart and medicine room under supervision, and clean the utility room, treatment room and kitchen, while orderlies help keep the linen room neat and the utility room clean by cleansing enema and catheter trays; aides report any out-of-order or broken equipment to the nurse in charge, while orderlies are

BLEED THROUGH

required to keep the emergency oxygen equipment in working order and to take care of their own equipment. In addition, aides make beds, serve meal trays, feed patients if necessary, remove water pitchers from the rooms of N.P.O. patients after midnight, and make sure that patients who are scheduled for diabetes or blood sugar tests have water only. Orderlies must, in addition to the duties already described, check and obtain linen for their shifts, including the packs to make up beds when patients are discharged.

THE 1972 BULLETIN

In January, 1972, shortly after this suit was filed, these job descriptions were amended to include for both aides and orderlies the duties of making beds, serving food trays, performing clini-tests and acetests, and applying binders. The new job description added for aides the duty of measuring, describing, and emptying the contents of Gomco suction and urine drainage bags. For orderlies, the new job description added the duties of assisting in restraining patients, pursuing runaway patients, bringing oxygen tanks from the basement, cleaning up minor spills, assisting in applying, cutting, and removing casts, inserting rectal suppositories, and assisting with cardiac massage.

It is apparent that at least through January, 1972, most of the time period covered by this lawsuit, the job descriptions for aides and orderlies were virtually identical. From January, 1972, until the date of trial, the job description for orderlies added duties apparently not performed by aides that required effort (restraining unruly patients, pursuing eloping patients, and bringing oxygen tanks from the basement of the hospital), skill and responsibility (cast work and assisting with cardiac massages) greater than or, at least, different from the skill, effort and responsibility required of aides. These additional tasks, according to the hospital administrator, were not new but traditionally had been performed

by orderlies. In addition, the 1972 bulletin describing the tasks assigned to aides no longer listed various sterile procedures.

ACTUAL DUTIES PERFORMED

The district court, in addition to making more particularized findings of fact about duties actually performed, also made what might be called a general finding of fact as follows:

> The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answering requests for small personal needs.
>
> The typical orderly spends a very small part of his working time in . . . routine patient care . . . but spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing[s], setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects.

In determining whether these differences existed and whether they are significant we focus on the differences that the district court found to exist: sterile procedures, lifting heavy patients, controlling unruly patients, "stat" calls, free time, setting up traction, obtaining oxygen tanks, removal of casts, and post-mortem tasks.

STERILE PROCEDURES

The district court, apparently relying solely upon the testimony of the hospital administrator, made the following finding of fact concerning the performance of sterile procedures:

> At all times, orderlies have been trained in Sterile

BLEED THROUGH

> Techniques, which requires [sic] substantial skill, and includes [sic] catheterization, catheter irrigation, rectal suppositories, TUR dressing change, and bladder irrigation. Since October of 1968, aides have received no training in Sterile Techniques. A typical orderly in a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon the patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides.

A careful examination of the record demonstrates that this finding of the district court is clearly erroneous in a crucial respect: until October 5, 1972, aides performed virtually all catheter irrigations and catheterizations of females.

Although the hospital administrator did testify that aides have not received training in sterile techniques since 1968 and that in October, 1968, a directive was issued commanding that aides previously trained to do catheterizations should cease doing them, he also admitted that aides might have continued to do these sterile procedures after 1968. The reason for this change of policy, he explained, was that a number of doctors wanted sterile procedures to be performed only by professional medical personnel, that is, by Registered Nurses and Licensed Practical Nurses, not by nonprofessional aides.[9] The hospital administrator also testified that at least six orderlies, three in the x-ray section of the hospital, two in physical therapy, and one in central supply, performed no sterile procedures at all.

Despite the hospital's decision to discontinue the training

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[9] It is anomalous that the concern of the hospital did not extend to male patients who, of course, were catheterized and had other sterile procedures performed upon them by non-professional orderlies.

of new aides to do sterile procedures, and despite the hospital's announced policy not to permit aides already trained to perform these tasks, the 1969 job bulletin for aides, effective until 1972, listed "sterile procedures" including catheterizations and catheter irrigations as duties. More importantly, aides Catherine Bryant, Dorothy Crump, Elizabeth Wilhite, Josephine Hatfield, Mary Pauline Wathen, and Ruby Davis; Licensed Practical Nurse, Susan Wink; and Registered Nurses Norma Ward, a unit supervisor, and Katherine Wathen, the evening supervisor of the hospital, all testified that aides previously trained continued to do sterile procedures on a regular basis until a few weeks before the commencement of trial. The sterile procedures performed by aides on a regular basis until just prior to trial included catheterizations, catheter irrigations, bladder installations and irrigations of females, and reinforcement of dressings and eye soaks. Even after the new October, 1972, directive was issued, one aide, relying on it, was reprimanded when she failed to do a catheterization ordered by a Licensed Practical Nurse and was instructed to obey any future orders.

In light of this evidence, we hold that the finding of the district court that aides rarely, if ever, performed sterile procedures, particularly catheterizations and catheter irrigations until the commencement of trial, is clearly erroneous.[10]

[10] Since at least six orderlies performed no sterile procedures, and a number of aides did perform these tasks, we need not decide whether the district court was correct in its determination of the number of catheterizations and catheter irrigations that a typical orderly performed on a typical day, and the time required to perform them. We observe, however, that the minimal evidence introduced respecting this question came primarily from an orderly who contradicted himself not only about the number of catheter irrigations and catheterizations he performed each day, but also about the length of time it took him to perform them. Although testifying that he did perhaps five or six catheterizations each day, he also admitted that sometimes he did only two or three Foley catheterizations each week; that a Foley probably took him longer than other kinds of catheterizations, and that a Foley catheter could be inserted in only ten minutes. And, although he testified that it might take him as long as 45 minutes to do a catheter irrigation, he recalled having told counsel for appellant that a Foley irrigation many times took

BLEED THROUGH

LIFTING HEAVY PATIENTS

The district court, in its general finding of fact, apparently concluded that aides did not have the duty of lifting heavy patients, because he indicated that this task was one that distinguished the duties of orderlies from those of aides. The evidence, however, indicates that, as a rule, aides and orderlies helped each other to lift heavy patients. Dorothy Crump, an aide, testified that although an orderly usually assisted a patient in getting on his crutches and *helped* to weigh heavy patients, she would sometimes summon an aide and sometimes an orderly to *assist her* in lifting a heavy patient. Elizabeth Wilhite, an aide, testified that she needed help almost daily in lifting heavy patients and that she would call either an orderly or an aide to *assist her*. Josephine Hatfield, an aide, testified that orderlies usually *helped her* to lift heavy patients but that if an orderly were not available, she would obtain assistance from another aide. Although orderlies single-handedly lifted heavy patients, particularly when bathing male patients, aides also lifted female patients single-handedly except when they were either extremely heavy or uncooperative.[11]

We hold, therefore, that the finding of the district court that orderlies but not aides lifted heavy patients is clearly erroneous.

STAT CALLS

In contrasting the assignments of aides and orderlies, the district court found that:

> [t]he typical aide is assigned to a fixed number of patient

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only a few seconds. The other orderlies did not indicate how often they performed, or how long it took them to perform sterile procedures, and one of them stated that he did nothing that aides did not do.

[11] One aide who worked in the obstetrics section of the hospital testified that she was often required to lift patients who were paralyzed from the waist down. In 1971, she received the "special wage" of $2.25 per hour. This was, however, still twenty cents less per hour than the wage received in 1971 by orderlies with only nine months experience.

> rooms, and number of patients therein, at an assigned duty station. The typical orderly is not assigned to any one duty station, or even to one certain floor, but is required to answer calls throughout the hospital, known as Stat calls, many of which arise from emergencies. The orderly is free from supervision and must exercise discretion and decision making in determining whether to respond and go to a call at another location, or to continue the performance of the duty upon which he is then engaged. The Stat calls frequently require the orderly to hurry to meet an emergency, upon which not infrequently life itself depends.

This finding of the district court gives the impression that the orderlies were constantly hurrying about the hospital in response to stat calls, and that patient lives often depended upon their prompt response. The evidence, however, affords little support either for the district court's finding or for the inferences that could be drawn from the finding. Denford Morris, an orderly, testified that he was assigned to the third floor, specifically to two stations on that floor, and that he received approximately one stat call per week, and that the last stat call he had received was approximately two weeks before. The purpose of this call, he thought, was "probably" to take a patient to the coronary care unit, but by the time he had arrived four or five other orderlies were already present, so that he was not needed. He also testified that he received stat calls to do catheterizations of males. Kenneth Thomasson, an orderly from 1969 to 1971, testified that he had been assigned to the third floor most of the time; that he went to other floors in response to stat calls, but that aides were already present by the time he arrived. Norma Ward, a registered nurse and a unit supervisor, testified that orderlies received stat calls "pretty often" but that many of these calls were occasioned by a male needing to use a urinal or to be catheterized. Katherine Wathen, the evening supervisor of the hospital, testified that orderlies rarely received stat

BLEED THROUGH

calls on her shift and rarely received two stat calls at once. When one did receive simultaneous calls, she indicated that he usually made up his own mind about where to go first. However, Susan Wink, a registered nurse, testified that when stat calls were made, the station where the orderly was working would call the station initiating the call, ask the purpose of the call and whether the orderly was needed immediately.

Although aides do not have to respond to stat calls and rarely have to "travel" (one aide testified that she had traveled several times the previous week), aides do have to respond to lights turned on by patients for any number of reasons. Catherine Bryant, an aide, testified that aides have to answer lights all the time, that sometimes there are not too many, that at other times they are going on right up until the time their shifts end, and that still at other times answering patient lights required them to work past the time their shifts ended. She also testified that when patients turned on their lights, they usually wanted a bedpan, or medication for pain, and that males often wished to use a urinal. When an aide received the last-mentioned request, she would initiate a stat call if an orderly were not available on the floor, and if he were occupied elsewhere in the hospital and could not come to assist the male patient, the aide would assist him herself. Elizabeth Wilhite, who worked in the orthopedic section of the hospital, also testified that patient lights were turned on frequently and that it was not unusual to have four or five patient lights go on all at once on her station. It should also be observed that when an aide sees two light go on simultaneously, she has to choose which to respond to first, and that her decision takes into account the nature of the patient's illness and the urgency of his circumstances.

In light of this evidence, we conclude that the district court's finding that the typical orderly, in contrast to the typical aide, was not assigned to one floor and that he frequently had to hurry in response to stat calls in order to meet an

emergency upon which life not infrequently depended is clearly erroneous. To the extent that the district court found that orderlies had to meet emergencies while aides did not, we find that this is also clearly erroneous because the record demonstrates that aides had to respond to lights, that as a consequence of these lights they sometimes initiated stat calls, and that aides were already present by the time an orderly arrived after being paged. Therefore, to the extent that orderlies responded to emergency situations, aides did also.

FREE TIME

The district court found that:

> [t]he work of the orderlies is continuous, demanding and tiring, and the emergency calls are frequently hard on the nerves of the orderly. The orderly has very little time for rest or relaxation during his working time. The aides perform work under much less tension and strain, and have more opportunity for rest and relaxation during the work day.

There was very little testimony given regarding the amount of free time aides and orderlies have. The little testimony that there was, however, indicates that aides have less free time than do orderlies. Although orderlies have regularly scheduled duties and do have to respond to stat calls approximately one time a week, aides seem to be in virtually continuous motion making beds, serving trays, giving baths, performing sterile procedures, cleaning equipment, and a host of other activities, including responding to patient lights. Kenneth Thomasson,[12] an orderly, testified that he did have free

[12] The only testimony about the tension under which non-professional assistants to the nursing staff worked was given by Kenneth Thomasson, who stated in response to questioning:

> Q. Why did you leave the hospital?
> A. Looking for a better job.
> Q. You didn't like the work out there?
> A. I liked it as well but it was hard on my nerves.

BLEED THROUGH

time although the amount varied with the shift he was working on. On the day shift, he had very little free time, from "three to eleven you have slack times on up in the night and eleven to seven you've got a lot of slack time." Denford Morris, who worked on the day shift, testified that orderlies might have a little free time sometimes. Dorothy Crump, an aide, testified that aides don't have much free time. Katherine Wathen, the evening supervisor of the hospital, testified that orderlies have more free time than aides do.

In light of this testimony, we conclude that the district court's finding that aides have more free time than orderlies do is clearly erroneous. The evidence indicates at a minimum that aides and orderlies have approximately the same amount of free time, and it may fairly be said that the evidence indicates that orderlies have more free time than aides do.

We conclude, contrary to the district court, that the differences in wages paid to the orderlies and aides cannot be justified by its finding that orderlies alone performed the additional duties of removing casts, setting up traction, and carry-

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Q. Why was it hard on the nerves?
A. I just got too involved with the people, I guess.
Q. Uh, you got "stat" calls?
A. Yes, sir.
Q. Did you have to hurry when you got 'em?
A. Yes, sir.
Q. When you got there did you find people in trouble sometimes?
A. Yes, sir.
Q. Was that hard on your nerves?
A. Well, the rush is; right at the time you have — uh, it's happening it doesn't bother you so much and then after it's over with I think about it, it kind of bothers.

The foregoing testimony, in response to leading questions, suggests that Thomasson may be a sensitive person more troubled seeing patients who were very ill than by having to respond promptly to stat calls. He subsequently became employed at a doughnut shop.

No aide testified directly about the tension resulting from responding to patient lights and performing other duties, although one aide stated that sometimes she was kept running all day. The imprecise testimony about tensions particularized to orderly Thomasson, and the absence of testimony about tensions experienced by the typical orderly and aide, demonstrates that the finding that aides "perform work under much less tension" than orderlies do is without evidentiary support and therefore clearly erroneous.

ing oxygen tanks from the basement. These additional duties were not performed by all orderlies and consumed only a negligible portion of the workday of those orderlies who undertook them. *See, e.g., Brennan* v. *Prince William Hospital Corp.*, 503 F.2d 282 (4th Cir. 1974), *cert denied*, 43 U.S.L.W. 3495 (March 18, 1975), *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973), *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972), *Shultz* v. *American Can Co. — Dixie Products*, 424 F.2d 356 (8th Cir. 1970), *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). The last three cases were cited with approval by the Supreme Court in its recent decision *Corning Glass Works* v. *Brennan, supra*, at n. 24.

The testimony regarding these additional tasks is as follows:

REMOVAL OF CASTS

The district court found that:

> [t]hroughout the hospital, but particularly in the orthopedic section, the typical orderly exercises the skill of cutting a cast where the physician has directed, and the orderly is trained by the physician to do this. There is no evidence that the aide is trained at all to do this, or ever performs this function. The cutting of casts requires a different and additional skill by the orderly.

We agree with the district court that there is no evidence in the record to indicate that an aide has ever cut a cast at the direction of a physician. However, there is also no evidence to support his finding that a typical orderly exercises the skill of cutting casts with any regularity. Orderlies stationed in the orthopedic section may do this on a somewhat regular basis, but these orderlies can not be considered typical. Denford Morris, an orderly who has been assigned to the third floor since 1967 or 1968 testified that he had cut only one cast from that time until the time of trial. The other orderlies who testi-

BLEED THROUGH

fied did not indicate whether they had ever cut a cast. In addition to holding that the district court's finding that a typical orderly exercises the skill of cutting a cast is clearly erroneous, we also hold that the cutting of one cast over a period of four or five years does not sufficiently distinguish the jobs of aides and orderlies to justify a pay differential. *See, e.g., Hodgson* v. *Behrens Drugs Co., supra, Hodgson* v. *Fairmont Supply Co., supra, Shultz* v. *American Can Co. — Dixie Products, supra.*

TRACTION

The district court found that:

> [w]hen traction is required to be set up in the hospital, the typical orderly assigned must know the various types of traction, and how to set up the apparatus, and routinely perform this function. The aide may from time to time take a patient in or out of traction, add or remove weights; but does not have the knowledge or exercise the skill just described for the orderly. In addition to the skill, the setting up of traction requires the lifting of heavy weights and requires substantial exertion by the orderly.

The record does indicate that the usual practice at the hospital is for orderlies to set up traction, when necessary, and for aides to change the weights on traction and to take patients in and out of traction for exercise. Denford Morris, an orderly who worked on the surgical floor, stated, however, that he set up traction only infrequently. His estimate varied from an average of once or twice a month to a possibility of two to three times a week. He testified that it might take as long as thirty minutes to get the equipment from the orthopedic section of the hospital, set it up and place the patient in it. Norma Ward, a supervisor of the medical unit, testified that in her section, orderlies set up traction; but that her section required traction equipment only on an irregular basis, approximately two or three times per month. Kenneth Thomas-

son, an orderly who worked on the medical floor of the hospital, also testified that traction equipment was needed only infrequently, that he rarely set up traction, and that aides sometimes helped him do it. Appellees also elicited the following testimony from him:

> Q. And you have to know what kind of traction to get and what you're doing to set it up, don't you?
> A. Right.
> Q. And Aides don't do – don't know that, do they?
> A. Well, most of 'em know more about it than I did.

Perhaps the most revealing testimony about the ability of some aides to set up traction, and whether, in fact, they performed this task, came from Elizabeth Wilhite, an aide who had been assigned to the orthopedics section of the hospital for thirteen years:

> Q. Uh, describe how your work involves traction?
> A. Well, naturally, I put it on, and when I first started there, I'd trail along after Mike Livers uh, he's an Orderly that has retired, 'till I learnt traction, because I wanted to learn, and I've set up traction such as Buchs Traction and such as cervical traction, but now, the Ninety-nine Traction, I've never done that because it's not ordered too often. I think it's been ordered once or twice since I've been there.
> Q. Have you ever had occasion to show anyone else how to do traction?
> A. Yes, sir.
> Q. Uh, who?
> A. Jim Johnson, a little Orderly that came in – it hasn't been too long – too many weeks ago, and he was on our station the other afternoon and our regular Orderly wasn't there.
> Q. When was this?
> A. This was about a week before last, or two weeks ago; something like that.

BLEED THROUGH

Q. Okay; and what happened?

A. Well, I was told to go back and show him and help him, how to put this traction on.

Q. Uh, who told you to do that?

A. An RN.

On cross-examination by appellees, Elizabeth Wilhite gave the following testimony:

Q. Now, when was the last time that you set up traction; you got the equipment and you set it up, a Buchs Traction or a cervical traction?

A. This was a Buchs Traction.

Q. When was the last time?

A. It was about a week and a half ago . . .

Q. Now then, who — what classification uh, is it Orderlies who set up that traction, nearly all of those tractions?

A. Yes, sir.

Q. It is not the Aides that set up that traction, are they? It is the Orderlies?

A. Well, we help with it. You mean these big frames that you pack and put over the beds; yes, sir; we help the Orderlies. They could not do it by themselves, no more than we could do it by ourselves.

Q. Are they heavy?

A. Yes, they're heavy.

Q. Does — which one is the one that has the responsibility of doing the lifting and doing the heavy work, the Aide or the Orderly?

A. Well, the Orderly is on one end of the frame and we're on the other end of the frame.

Q. And you [do] just as heavy work as the Orderlies; is that what you're telling?

A. I would have to.

Q. Are you telling the Court that that's what you're doing?

A. I would have to lift as much as he did. If we — if I didn't, the frame would go down on my side.

Q. Do you lift up the bed and put it on blocks sometimes in setting up that traction?

A. I have helped lift up the beds, yes, sir; and I have helped also put the blocks under them.

She also testified that there was at least one other aide in the orthopedics section who had set up traction.

In light of the foregoing testimony, we conclude that orderlies set up traction on such an infrequent basis that this duty cannot justify a higher wage. We also conclude that because there were aides who were also qualified to perform this duty, this task cannot be regarded as a distinguishing characteristic of the job of orderly. *See, e.g., Brennan* v. *Prince William Hospital Corp., supra, Hodgson* v. *Behrens Drug Co., supra, Hodgson* v. *Fairmont Supply Co., supra, Shultz* v. *American Can Co. — Dixie Products, supra, Shultz* v. *Wheaton Glass Co., supra.*

OXYGEN TANKS

The district court, in distinguishing the jobs of aides and orderlies, found that orderlies brought heavy oxygen tanks from the basement of the hospital, and, by negative implication, found that aides did not. The record indicates that as a general rule, orderlies brought oxygen tanks from the basement when necessary and that aides started the oxygen. However, all rooms in the hospital were equipped with oxygen, and the only time that it was necessary to bring oxygen tanks from the basement was when the hospital had an overflow of patients who were placed in the halls and needed oxygen. None of the orderlies who testified indicated that he had ever brought an oxygen tank from the basement. Moreover, it appears that aides were able to perform this task. Aides Josephine Hatfield and Susan Wedding both testified that they had procured oxygen tanks from the basement when necessary.

Accordingly, we determine that although orderlies may have carried oxygen tanks from the basement, the task was an infrequent one that aides were also capable of performing.

BLEED THROUGH

Accordingly, this duty does not significantly distinguish the job of aides and orderlies, and does not justify higher wages for orderlies.

UNRULY PATIENTS

The district court found that

> [t]he hospital has two rooms for violent patients, and these rooms are almost always in use. In addition, the hospital from time to time has alcoholic, narcotic, and other patients who are not routinely safe to themselves or other patients or personnel. The orderly has the responsibility for almost all care to those patients, which is performed under a less satisfactory working condition.

In so finding, the court apparently relied upon the testimony of the hospital administrator and that of Denford Morris, an orderly. However, although the hospital administrator testified in his deposition that orderlies are responsible for restraining violent patients and for sitting with patients "who are in custody of the law, where an aide does not," he also conceded that aides might assist orderlies in restraining patients on occasion. Denford Morris testified that unruly and violent patients are kept in special rooms and that orderlies have to "go down and help restrain them . . . ." When he was asked how often he had been required to do this, he testified that "it doesn't happen real often with us . . . . [M]aybe a time or two or such matter [each month]." He also testified that most of the time the lock-up rooms are in use, and that most of the nursing care to patients in these rooms was "probably" given either by an orderly or someone assisted by an orderly.

This testimony, however, was contradicted by Ruby Davis, an aide assigned to a station with a lock-up room, who was the only person whose testimony regarding the nursing care actually performed was based upon direct knowledge. She testified that she handled unruly patients about once each week, assisted by whoever was available including aides, orderlies and

supervisors. She added that when she performed services for these patients, such as taking blood pressure, an orderly or sometimes an aide would stand guard. Catherine Bryant, an aide, testified that aides summoned orderlies *to assist them* in restraining patients *only if* they became very unruly; that aides and orderlies worked together in restraining violent patients; and that during her fifteen years at the hospital she never saw an orderly get into a "scuffle" with a patient. Aide Dorothy Crump testified that when her patients became unruly she would sometimes summon an aide and sometimes an orderly to assist her. Finally, Josephine Hatfield, an aide, testified that orderlies did not look after violent patients more than aides.

Our examination of testimony of both aides and orderlies convinces us that there is insufficient, if any support, for the finding that orderlies performed most of the nursing care for unruly patients. Even if some orderlies were exposed more often to dangerous patients than some aides were, the orderlies' exposure to greater risk did not occur with sufficient frequency or take up a sufficiently large portion of their working day to entitle them to a higher wage. We agree with the court in *Brennan* v. *Prince William Hospital Corp.*, *supra*, at 286, that "[h]igher pay is not related to extra duties when . . . [t]he extra task consumes a minimal amount of time and is of peripheral importance."

POST-MORTEM TASKS

The district court found that:

> [a]n unpleasant task at the hospital is post-mortem care. This is done by aides and orderlies; but because the hospital has many more aides than orderlies, this unpleasant duty falls much more frequently upon the typical orderly, than the typical aide . . . The orderly performs all post-mortems on the male deceased patients; and the aides share in turn the post-mortem care upon deceased female patients.

BLEED THROUGH

The evidence indicates, that, as a general rule, orderlies did post-mortem work on deceased males and aides on deceased females. Since aides outnumbered orderlies six to one, it would appear that orderlies were likely to perform more post-mortems than aides. However, none of the orderlies who testified indicated that he had ever done post-mortem work. Moreover, Elizabeth Wilhite testified that although she performed post-mortems, she, like other aides, also assisted orderlies in doing post-mortems and that she usually performed only one post-mortem each month.

Despite the paucity of evidence presented concerning the division of post-mortem tasks between aides and orderlies, it is clear that both did such work. The evidence does not support the district court's finding that there was always a division of post-mortem procedures based upon the sex of the deceased. Accordingly, we conclude that any greater frequency with which orderlies may have performed this work does not support a determination that for this reason the job of orderly required greater skill, effort, or responsibility, or was performed under different working conditions. "Disproportionate frequency in the performance of the same routine tasks does not make the job unequal." *Brennan* v. *Prince William Hospital Corp.*, *supra*, at 287, citing 29 C.F.R. § 800.123 (1973).

On the basis of the evidence that we have already discussed, we hold that the general finding of fact made by the district court that a

> typical orderly . . . spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects

is clearly erroneous. In fact, some orderlies performed no sterile procedures at all and the "typical" orderly spent little

time lifting heavy patients, setting up traction, handling unruly patients, responding to stat calls, and lifting oxygen tanks and other heavy objects. Indeed, none of the orderlies who testified indicated that he had ever carried an oxygen tank from the hospital basement or had changed a TUR dressing.

Although the district court determined that aides spent substantially all of their working time in "routine patient care," the record demonstrates that this *routine* care included performing sterile procedures, particularly catheterizations, catheter irrigation, bladder installation and irrigation; lifting heavy patients; caring for violent and potentially violent patients; and answering emergency calls in the form of patient lights. Moreover, the record demonstrates that some aides transported oxygen tanks from the hospital basement and set up traction.

Orderlies also were required to perform "routine" tasks. For example, Denford Morris, who was asigned to two stations of the third floor of the hospital on the seven a.m. to three p.m. shift, testified that his first task each morning was to ascertain what linen was needed on the third floor that day, to bring it from the basement, and to distribute it in appropriate closets on the third floor. This task required no special skill, effort, or responsibility. Then he took the eight a.m. rectal temperatures of the male patients on his two stations and performed a number of other nursing duties including giving enemas, irrigating catheters, inserting catheters, giving sitz baths, finishing baths on male patients, walking patients, inserting suppositories, taking eleven a.m. temperatures, and helping to distribute lunch trays. Kenneth Thomasson, a former orderly, testified that he made six or seven beds each day when he worked on the morning shift.

On the afternoon shift, the evidence indicates that neither aides nor orderlies were required to bathe patients or change beds unless a patient was discharged from the hospital or had soiled his bed. If a male patient soiled his bed, an orderly had the responsibility of cleaning up, and if the patient were

BLEED THROUGH

female, an aide did. Aides took temperatures and blood pressures, assisted patients to the bathroom, reinforced dressings, irrigated bladders, performed sterile soaks for cataract patients, regularly turned patients and got them out of bed, distributed dinner trays, prepared patients for surgery, and until October, 1972, inserted catheters. All of these duties, with the exception of distributing dinner trays, were performed for male patients by orderlies.

Aides and orderlies on the night shift did not generally perform scheduled nursing procedures, but spent most of their time attending to the specific needs of patients by, for example, answering calls, helping them out of bed and assisting them to the bathroom. Both also performed assigned duties, including, for example, inserting catheters, giving douches, unstopping catheters to take tests, and clamping catheters off.

The record demonstrates that at least those aides who were trained to, and did perform sterile procedures, fulfilled duties that required skill, effort and responsibility substantially equal to that required by orderlies, and performed them under substantially identical working conditions. In making this determination, we observe that the district court made no finding and, indeed, could not make a finding on the record before him, that the duties that in his view distinguished the job of orderly from that of aide were performed by *all* orderlies. Nor did he find that the orderlies who did perform them did so with sufficient frequency to justify a higher wage. In fact, we are unable to find any evidence that any orderly performed any duty not also performed by an aide with three legally insignificant exceptions: (1) the transportation of linen from the basement; (2) the infrequent removal of casts; and (3) the duty of responding to "stat" calls. The first exception requires no special skill, effort, or responsibility and does not justify the higher wages paid to orderlies. The second, was apparently performed only once during a four or five year period by a "typical" orderly. In order to justify higher wages, this duty would have to be performed with some regularity and would

have to consume a substantial portion of an orderly's work day. The third, is not only an infrequent duty, but it is also not essentially different from the aide's corresponding duty of responding to patient lights.

Our interpretation of the Equal Pay Act corresponds to that of the agency charged with its enforcement. Although agency interpretation is not controlling,[13] it is entitled to great weight, and in this instance we find it well-reasoned and persuasive. In 29 C.F.R. § 800.128 (1974), the Secretary of Labor has promulgated an interpretive bulletin providing that:

> . . . the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort . . . . [However,] a wage differential might be justified [if] . . . the extra effort so expended is substantial and is performed over a considerable portion of the work cycle.

This construction has been consistently adopted by courts in interpreting the equal pay provisions of the Fair Labor Standards Act. *E.g., Shultz* v. *American Can Co. — Dixie Products,* 424 F.2d 356 (8th Cir. 1970); *Hodgson* v. *Montana State Board of Education,* 336 F. Supp. 524 (D. Mont. 1972). *See also Shultz* v. *Wheaton Glass Co.,* 421 F.2d 259 (3d Cir. 1970), *cert. denied,* 398 U.S. 905 (1970), *on remand,* 319 F. Supp. 229 (1970). In *American Can Co.,* the court held that males who performed substantially the same work as females but in addition thereto spent from 2 to 7% of their work day doing heavy lifting were not entitled to wages higher than those paid to the females. In the *Montana State*

[13] In 29 U.S.C. § 206(d), Congress did not authorize the Secretary of Labor to promulgate binding regulations, and the bulletin with which we are concerned appears in 29 C.F.R. Subchapter B, entitled "STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS." However, when the Secretary's interpretation of the Act does not contravene the intent of Congress, it is entitled to great deference. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971), *Brennan* v. *City Stores, Inc.,* 479 F.2d 235 (5th Cir. 1973). *See also Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

BLEED THROUGH

Board of Education case, the court found that the employer violated the Equal Pay Act when it paid female housekeepers wages lower than those paid to male custodians, even though both groups spent the predominant part of their work days engaged

> "in routine custodial duties consisting of sweeping, mopping, washing, scrubbing, dusting, and cleaning of bathrooms . . . [because the] so-called 'extra duties' performed by the . . . men either took only minutes per day or per week, or [were] also performed by the women . . . ." 336 F. Supp. at 525.

In the *Wheaton Glass* case, the court found that even if all male selector-packers performed all 16 additional tasks that their employer stated consumed 18% of their working day, because the additional tasks were not shown to be of greater economic value than those performed by females, they did not justify payment of higher wages to the male selector-packers than to the females.

The cases challenging differentials between wages paid to hospital orderlies and aides have applied the principle that differences between duties must be substantial in terms of effort required, and time devoted. In the cases where the wage differences were upheld, the evidence demonstrated that orderlies regularly performed duties that aides were not required to perform, and that the orderlies were required to employ either greater skill, effort or responsibility than the aides. *E.g., Hodgson* v. *Golden Isles Convalescent Homes, Inc., supra,* and *Hodgson* v. *Good Shepard Hospital,* 327 F. Supp. 143 (E.D. Tex. 1971).[14]

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[14] See also *Shultz* v. *Royal Glades, Inc.*, 66 CCH Lab Cas. ¶ 32,548 (S.D. Fla. 1971), where the court, in rejecting a challenge under the Equal Pay Act, found that orderlies spent 50 to 60 percent of their time lifting patients who were too heavy for a single aide; 20 percent of their time lifting heavy patients for aides upon request; and procured heavy oxygen tanks, carried patients' luggage, and cared for difficult-to-handle patients. In addition, orderlies, unlike aides, were required to work split shifts from 6:00 a.m. to 1:00 p.m. and then from 5:00 p.m. to 8:00 p.m.

In *Golden Isles Convalescent Homes*, the hospital employed one to four orderlies who performed a number of tasks not performed by its thirty to forty aides, including the insertion of catheters for male patients, total lifting, irrigation, setting up traction, the pursuit of missing patients, the driving of patients, setting up oxygen tanks, and "floating" throughout the hospital. The court of appeals expressly rejected the contention that the record demonstrated that "these duties were performed by aides, that they did not differ greatly from aides' other duties, and that they were performed too infrequently to justify a conclusion that the work was unequal." 468 F.2d 1157.

In the *Good Shepard Hospital* case, the district court found that orderlies performed a number of tasks not performed by aides including assisting the orthopedic surgeon, catheterizations, and emergency room work; that they, unlike aides, were responsible for the security and protection of hospital personnel, patients and visitors, for the restraint of patients in the hospital's lock-up rooms, and for fire and disaster drills; that they, unlike aides, were not assigned to particular floors but performed hospital-wide services and were required to respond to emergency calls; and that they spent up to twenty-five per cent of their working day doing heavy lifting and loading, and in ambulating patients.

In contrast, in the cases in which courts have invalidated separate wage scales for aides and orderlies, the evidence demonstrated that both performed substantially equal work, and that any differences in the duties did not justify higher wage rates for males. *E.g.*, *Hodgson* v. *Brookhaven General Hospital*, 470 F.2d 729 (5th Cir. 1972); *Hodgson* v. *Maison Miramon, Inc.*, 344 F. Supp. 843 (E.D. La. 1972); *Hodgson* v. *George W. Hubbard Hospital of Meharry Medical College, Inc.*, 351 F. Supp. 1295 (M.D. Tenn. 1971).

In the *Meharry Medical College* case, the court, in awarding back pay to nurse aides, rejected the hospital's assertions that higher wages to males were justified because male "nurse

BLEED THROUGH

attendants" performed additional duties including mopping floors, transporting bodies to the morgue, assisting undertakers in the release of bodies from the morgue, moving helpless patients in and out of bed, transporting large gas cylinders, delivering heavy supplies to the wards, changing mattresses, transporting stretcher patients, and carrying out temporary emergency duties in areas of the hospital other than the station to which they were assigned. Instead, the court found, that aides and orderlies assisted each other in these tasks, and that emergencies requiring special efforts by orderlies alone arose only occasionally.

In the *Maison Miramon* case, *supra*, the district court found that the defendant nursing home had violated the Equal Pay Act by paying higher wages to orderlies than were paid to aides when both

> . . . are generally responsible for the personal care and comfort of the Greenbriar patients and are usually assigned to the care of female and male patients, respectively. The basic duties of each include the feeding of patients, brushing and combing their hair; making beds; changing, turning, and lifting patients; securing and emptying bed pans; and assisting patients in and out of bed. When needed, and as available, the aides and orderlies assist each other. 344 F. Supp. 845.

In *Brookhaven Hospital, supra*, the court of appeals reversed the initial decision of the district court finding a violation of the Equal Pay Act. In seeking reversal, the hospital contended that although aides and orderlies were primarily responsible for the routine care of patients assigned to them,

> . . . orderlies were frequently called upon to perform general hospital duties which aides were rarely called upon to perform – duties requiring more than routine skill (catheterizations), effort (lifting heavy patients, bringing in stretcher patients, setting up traction, helping in the application of heavy casts, subduing violent pa-

> tients, holding patients down in uncomfortable positions during spinal taps, moving TV sets and other heavy equipment, assisting in the emergency room, bringing up supplies), and responsibility (maintaining hospital security and preparing to assume leadership in the event of a fire). 436 F.2d at 723.

The court of appeals remanded to the district court for specific findings of fact whether these additional tasks required 1) extra effort, 2) a significant amount of the time of all orderlies, and 3) were of an economic value commensurate with the pay differential. The district court found the jobs of orderlies and aides required an equality of effort, and the court of appeals affirmed. It held that "the record supports the affirmative statement that orderlies and aides expended substantially equal effort in performing all of their duties, however divided and ranked." 470 F.2d 730.

Finally, in *Brennan* v. *Prince William Hospital Corp., supra,* the court reversed a judgment for the hospital entered after trial because it determined, as we do in this case, that the district court misapprehended the standard to be applied in cases alleging violation of the Equal Pay Act. In its opinion, the court held that the higher wages paid to orderlies were not related to additional duties assigned to them, because some orderlies received the higher wages without performing these duties, because some of the additional duties (restraining patients, providing physical security) were performed only infrequently, because aides performed some of the same tasks (heavy lifting, restraining patients), and because some of the additional duties required no extra skill, effort or responsibility (heavy lifting, "floating").

In the appeal before us, the district court did find that the duties of orderlies required greater skill, effort and responsibility. This legal conclusion is, however, based both upon findings of fact that we have held are clearly erroneous and also upon an incorrect interpretation of the Equal Pay Act.

BLEED THROUGH

Appellant has demonstrated that the aides who performed sterile procedures through October 1, 1972, were required to have substantially the same skill, to exert substantially the same effort, and to assume substantially the same responsibilities under identical working conditions as orderlies. Therefore, these aides are entitled to the same wages as orderlies for that period unless appellees can demonstrate on remand that the higher wages paid to orderlies were based on a factor other than sex.

This determination, however, does not terminate this litigation, because appellees are entitled to an opportunity to rebut the Secretary's prima facie case, and to show that a factor other than sex including, for example, "(i) a seniority system; (ii) a merit system; [or] (iii) a system which measures earnings by quantity or quality of production," 29 U.S.C. § 206(d)(1), explains the differential in wages paid to aides and orderlies.[15] In remanding this case to the district court for further proceedings, we observe that the burden of proving that a factor other than sex is the basis for a wage differential is a heavy one. We agree with the Secretary that "unless the factor of sex provides no part of the basis for the wage differential," the requirements for an exception are not met. 29 C.F.R. 800.142 (1974). This standard was adopted in *Hodgson* v. *Security National Bank*, 460 F.2d 57 (8th Cir. 1972), where the court found that no bona fide management training pro-

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[15] The enumerated exceptions to the rule requiring equal pay for substantially equal work are affirmative defenses. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196 (1974).

Even before the Supreme Court's decision federal courts uniformly treated the enumerated exceptions as affirmative defenses, which need not be anticipated by the Secretary. *E.g.*, *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970), *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). As the district court pointed out in *Wirtz* v. *Wheaton Glass Co.*, 284 F. Supp. 23, 33 (D. N.J. 1968), *rev'd on other grounds sub. nom. Shultz* v. *Wheaton Glass Co.*, *supra*, ". . . in the Upper House, the Chairman of the Senate Subcommittee, who guided the Bill through that body, declared that an employer who interposes a defense of exception to coverage assumes the burden of proving that it comes within the exceptive provisions of the Act."

gram existed that would justify paying male bank tellers wages higher than those paid to female bank tellers, and rejected the bank's unsubstantiated generalization that "women characteristically had been uninterested in management positions." 460 F.2d 60.

Other courts have also rejected an asserted defense based on preconceived notions of what constitutes "women's work" and "men's work." In *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972) the court, in reversing a judgment for the employer, found that the Secretary of Labor had sustained his burden of proving that the jobs performed by the company's single male employee and the three female employees at its stock desk required substantially equal skill, effort and responsibility and that the sixteen additional tasks performed by the male did not justify paying him a higher wage. In addition, the court refused to recognize "a training program coterminous with a stereotyped province called 'man's work' as a factor other than sex." 454 F.2d 498.

Moreover, although a bona fide job classification program that does not discriminate on the basis of sex is a defense to a charge of discrimination, H.R. Rep. No. 309 (1963), 1963 U.S. Code Cong. and Admin. News 687,689, on remand, consideration should be accorded to the hospital's own job descriptions. It admitted at trial that it had never hired a woman for the position of orderly because no woman had ever applied for the position. However, the hospital's own description of the two jobs, for "nurse assistant" and for "male nursing assistant," as an orderly is formally designated, may evidence an official hospital policy against hiring women as orderlies. In making this observation, of course, we do not intend to encroach upon the responsibility of counsel or upon the province of the district court.

Because of the errors heretofore pointed out, including the dismissal of the complaint at the close of appellant's evidence, the judgment of the district court is reversed and the cause is remanded for further proceedings.

BLEED THROUGH

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 2595

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor - - *Plaintiff*

v.

OWENSBORO-DAVIESS COUNTY HOSPITAL,
a Corporation - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter came before the Court without the intervention of a jury, and after the plaintiff had completed the presentation of its evidence, the defendants, without waiving their right to offer evidence in the event the motion was not granted, moved for a dismissal pursuant to Rule 41(b) on the ground that upon the facts and the law the plaintiff had shown no right to relief. The Court sustained the motion of the defendants, directed judgment against the plaintiff, and pursuant to Rule 52(a) the Court finds the facts specially and states its conclusions of law, as follows:

FINDINGS OF FACT

(1) This action was instituted by the Secretary of Labor, United States Department of Labor, on September 20, 1971 against the Hospital Defendant, and amended to include the City and County Defendants, seeking to enjoin the defendants from violating the provisions of Section 15(a)(2) and 6(d) of the Fair Labor Standards Act of 1938, as amended, and to restrain the defendants from any withholding of payment of wages found to be due under the Act.

(2) Jurisdiction is conferred upon the Court by Section 17 of the Act.

(3) The Hospital is a non-profit Kentucky corporation, located at 1101 Pearl Street, Owensboro, Daviess County, Kentucky, within the jurisdiction of this Court, and is operated by the City of Owensboro and the County of Daviess through a duly appointed Board of Managers.

(4) It was stipulated that the defendant is an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act, and thus the employees of the Hospital are entitled to the benefits of the Act by virtue of their employment by the enterprise.

(5) At the commencement of the trial, the parties agreed by counsel that the issue to be determined by the Court was whether or not there had been discrimination on the basis of sex between aides and orderlies employed by the Hospital, and that if such discrimination were found that it would not be difficult to determine the amount of pay due to the aides, and that in such event the parties would reach agreement on such amount, and failing the same that evidence as to the amount of such pay would be the subject of a subsequent hearing.

(6) The period covered by this action, by agreement of the parties, and based upon the Complaint, is from April 5, 1968, to the date of trial on October 31, 1972.

BLEED THROUGH

(7) This case proceeded to trial solely on the issues of whether or not the Defendant Hospital had violated the equal pay provisions of the Act contained in Section 6(d). The facts found in regard to this part of the cause follow.

(8) Involved in this case is the job of Male Nursing Assistant, usually called Orderlies, and the job of Nurse Assistant, usually called Aides. The discrimination charged is not limited to any department of the Hospital.

(9) The job descriptions for an Orderly, and for an Aide, reflect substantial differences in duties, and these differences exist in the actual duties performed.

(10) The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answer requests for small personal needs.

(11) The typical orderly spends a very small part of his working time in the routine patient care such as set forth in finding No. 10; but spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects.

(12) The duties of the orderly as set forth are separate and distinct from the duties of the aide, and require a greater skill, effort, and responsibility, and are performed under less attractive working conditions, than the duties of the aides.

(13) At all times, orderlies have been trained in Sterile Techniques, which requires substantial skill, and includes catheterization, catheter irrigation, rectal suppositories,

TUR dressing change, and bladder irrigation. Since October of 1968, aides have received no training in Sterile Techniques. A typical orderly, in a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon male patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides.

(14) Throughout the hospital, but particularly in the orthopedic section, the typical orderly exercises the skill of cutting a cast where the physician has directed, and the orderly is trained by the physician to do this. There is no evidence that the aide is trained at all to do this, or ever performs this function. The cutting of casts requires a different and additional skill by the orderly.

(15) The typical aide is assigned to a fixed number of patient rooms, and number of patients therein, at an assigned duty station. The typical orderly is not assigned to any one duty station, or even to one certain floor, but is required to answer calls throughout the hospital, known as Stat calls, many of which arise from emergencies. The orderly is free from supervision and must exercise discretion and decision making in determining whether to respond and go to a call at another location, or to continue the performance of the duty upon which he is then engaged. The Stat calls frequently require the orderly to hurry to meet an emergency, upon which not infrequently life itself depends.

(16) Substantially all of the duties of the aides are under the direct supervision of a licensed practical nurse

BLEED THROUGH

(LPN) or a registered nurse (RN). A very small part of the duties of the orderlies is performed under direct supervision from anyone.

(17) When traction is required to be set up in the hospital, the typical orderly assigned must know the various types of traction, and how to set up the apparatus, and routinely perform this function. The aide may from time to time take a patient in or out of traction, add or remove weights; but does not have the knowledge or exercise the skill just described for the orderly. In addition to the skill, the setting up of traction requires the lifting of heavy weights and requires substantial exertion by the orderly.

(18) The hospital has two rooms for violent patients, and these rooms are almost always in use. In addition, the hospital from time to time has alcoholic, narcotic, and other patients who are not routinely safe to themselves or other patients or personnel. The orderly has the responsibility for almost all care to those patients, which is performed under a less satisfactory working condition.

(19) An unpleasant task at the hospital is post-mortem care. This is done by the aides and orderlies; but because the hospital has many more aides than orderlies, this unpleasant duty falls much more frequently upon the typical orderly, than the typical aide. For example, upon the orthopedic station, there are a total of eight aides on the day shift, six on the evening, and only *one orderly*. The orderly performs all post-mortems on the male deceased patients; and the aides share in turn the post-mortem care upon deceased female patients.

(20) Each aide assigned to patient care spends several hours daily in making beds, assisting ambulatory patients to bathe, serving and picking up food trays, answering the room lights for patient requests, and taking temperature, blood pressure, and pulse reading of the patients. These duties require no special skills. Most of the orderlies spend

either no time, or a very little time in these duties, making the jobs of aide and orderly substantially different.

(21) The work of the orderlies is continuous, demanding, and tiring, and the emergency calls are frequently hard on the nerves of the orderly. The orderly has very little time for rest or relaxation during his working time. The aides perform their work under much less tension and strain, and have more opportunity for rest and relaxation during the work day.

(22) The work of the orderly is arduous and requires more physical effort and strength than the work of the aides.

CONCLUSIONS OF LAW

The Court concludes that:

(1) This Court has jurisdiction of the parties and the subject matter of this action.

(2) The plaintiff has failed to meet its burden of proof to establish that the tasks performed by the Orderlies and the Aides are substantially equal. The variation in pay, if any, is not the result of any discrimination upon the basis of sex. See *Hodgson* v. *The Good Shepherd Hospital*, 19 WH Cases 1067, 65 L.C. Par. 32,500 (Tex. 1971) 327 F. Supp. 143, and *Hodgson* v. *William & Mary Nursing Hotel*, 20 WH Cases 10, 65 L.C. Par. 32,497 (Fla. 1971).

(3) At the Owensboro-Daviess County Hospital there is no discrimination between employees on the basis of sex by paying the male orderlies wages at a higher hourly rate than that paid to female aides, because the work performed by orderlies involves substantially a different type of work, requiring different skills, greater training, greater effort and responsibility, greater physical effort and strength, and is performed with substantially less supervision than the work performed by the aides.

BLEED THROUGH

(4) The defendants have not violated Section 6(d) and Section 15(a)(2) of the Fair Labor Standards Act, as amended.

(5) The motion of plaintiff for a Permanent Injunction is denied on its merits.

(6) The motion of defendants to dismiss the action pursuant to Rule 41(b) is sustained, and the Complaint is dismissed with prejudice.

JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff take nothing herein, and this action is dismissed with prejudice on its merits, at the plaintiff's costs.
December 15, 1972

(s) James F. Gordon
United States District Judge

Copies to:
Counsel of record.

APPENDIX C

Congressional Debate on Equal Pay Act—House of Representatives, May 23, 1963—109 Cong. Rec. Part 7 (88th Cong. 1st Sess.) pages 9194-9218, 9761-9762, 9854 and 9941.

1. Congressman Goodell, Sponsor and a Floor Manager.

"The Chair recognizes the gentleman from New Jersey [Mr. Felinghuysen].

Page 9196

"MR. FRELINGHUYSEN. Mr. Chairman, I yield myself 6 minutes.

* * *

"Mr. Chairman, I rise in support of H.R. 6060. Perhaps, as the gentlewoman from New York has stated, this proposal is too little and too late. Perhaps, as the gentlewoman from Ohio says, this is only the first step in the right direction.

"Mr. Chairman, passage of this bill will mark an important milestone in the campaign for equal rights for women. Its aim is simple, few will argue about the desirability of what it seeks to achieve. Under its provisions, the women of America will be assured of equal pay when they perform equal work. This undeniable right is now to be bolstered and secured by appropriate legislative action.

"As you know, Mr. Chairman, last July, during consideration of this question on the floor of the House, a number of Republican amendments were adopted. Unfortunately, the administration incorporated only a few of these changes when it submitted a new equal pay bill, H.R. 3861, this year. The shortcomings of the administration proposal were numerous, and our committee had some difficulty in working out a satisfactory bill.

"Fortunately, on March 25, the gentleman from New York [Mr. Goodell] introduced H.R. 5605. This bill, for

BLEED THROUGH

the first time, placed the administration and enforcement of equal pay legislation under the Fair Labor Standards Act. This concept was the catalyst that had been needed. Very quickly this proposal was accepted by the members of the sub-committee.

* * *

"Thus it is apparent that a number of important changes have been made by our committee. As a result, we can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.

"The inequities which this legislation seeks to correct are apparent to us all. For example, a plant may have one rate for a classification such as male selector and packager and another for the classification female selector and packager. Yet both are doing the same job on the same assembly line. Such discrimination would be a violation. As another example, the classification names may not match—there would be male packagers and female selectors, nonetheless the work the two groups perform is identical in every respect. This, too would be a violation if the men as a group received more pay than the women. On the other hand, the male packagers may be required to lift the heavy crates off the assembly line and place them on dollies or do various jobs requiring additional physical effort. The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a significant difference which would justify a difference in pay."

* * *

Page 9197

"MR. THOMPSON of New Jersey. I yield to the gentleman from New York.

"MR. GOODELL. Mr. Chairman, I want to commend the gentleman from New Jersey [Mr. Thompson] as chairman of the subcommittee, for, I think, drastically changing and improving this legislation over what it was last year and over what was proposed earlier this year. His bill now is virtually my bill of March 1963, introduced at a time when no bill in either body of the Congress took the fair labor standards approach to equal-pay-for-women legislation.

"Mr. Chairman, I want to make one major point here: Some of our colleagues are disturbed because they feel that there may be a broad, regulatory power granted to the Secretary of Labor, and I want to make it clear and have the confirmation of the chairman of the subcommittee that there is no general regulatory power granted to the Secretary of Labor under this legislation, that he will have no such power if this legislation in its present form passes the Congress.

"MR. THOMPSON of New Jersey. I agree with the gentleman from New York emphatically."

* * *

2. "Equal Work"—Substantially Identical v. "Comparable"
P. 9209

"MR. GOODELL . . . I think it is important that we have clear legislative history at this point. Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

"We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not

BLEED THROUGH

equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are *substantially identical or equal.* I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort and working conditions, is intended to make this point very clear.

* * *

"MR. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of things, with an identity to them.

"MR. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.

* * *

"MR. THOMPSON of New Jersey. . . . Further, in the case of inspectors, someone asked hypothetically yesterday. Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously, this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

* * *

"MR. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill.

* * *

"Fourth. Only those jobs that are the same and normally related shall be compared.

* * *

"Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability and training may be considered under the broad heading of skill. The usual factors of push, pull, lift and carry, come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employee's job responsibility. . . .

* * *

"Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off the assembly line, or sweep up the room, or work on the loading dock during slack periods."

3. Employers Permitted to Evaluate Job Requirements

p. 9198

"MR. GOODELL: It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

* * *

". . . It is our intention I believe, on both sides of the aisle to provide here with the use of the terms 'effort,' 'skill,'

BLEED THROUGH

'responsibility' and 'working condition,' a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept, we want the private enterprise system, employer, and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

"MR. GOODELL. We have worked very hard in this debate to set up a legislative history to make it clear what our intention here is.

"*I introduced the first bill that would put this under the Fair Labor Standards Act in either body of Congress,* and the first bill using the terms 'effort,' 'responsibility' and 'working conditions' in defining equal work. Since this bill before us largely adopts my own personal views, and most of the words in this bill derive from my proposal, I would like to make clear the legislative history, and I think the chairman of the subcommittee agrees on these points:

"No. 1. Skill includes a myriad of factors. It is not limited to just a few. It includes training, experience, education, the qualities of the person himself, and a good many factors that are too numerous to put into the bill specifically, so we used a generality in referring to them. The same is true of effort, the same is true of responsibility, and the same is true of similar working conditions.

"No. 2. It is not necessary for an employer to have an elaborate and formal or written job classification system to qualify for exemptions under this bill or to prove that he is not discriminating on the basis of sex. If he has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees,

except as it shows a clear pattern of discrimination against sex."

* * *

"Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060. . ."

* * *

"Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

"Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

"Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination."

P. 9210 (Reprinted in Record)

"As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things . . . lifting or moving heavy objects [and] differences based on experience, training, or ability would also be excluded. . . ."

4. Secretary Has No Authority to Issue Regulations
pp. 9198 and 9208

"Mr. Griffin. That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also

BLEED THROUGH

knocked out the right of the Secretary of Labor even to issue interpretative regulations.

"I emphasize that interpretative regulations are also barred . . ."

* * *

"MR. GRIFFIN. I think it should be pointed out that an earlier version of this legislation did contain a section which would have authorized the Secretary to promulgate regulations. . . . As a result it should be clear from the legislative history that we do not intend to give the Secretary of Labor any broad regulatory powers. . . ."

* * *

"MR. GOODELL. I agree with the gentleman. . . ."

* * *

"I would like to make specific reference to the report of the other body in reference to regulation, because the other body specifically struck out the power of the Secretary to write regulations, then passed them all over.

"I want to quote it because I think it is inaccurate in the other body's report, and we should repudiate it as a part of our legislative history.

"They say on page 3 of the report:

> The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and procedures necessary to a sound administration and enforcement of this Act.

"The implication left there is that the Secretary will have the power to issue rules and regulations, but he would do it on a step-by-step basis. That is entirely wrong, it is an error, and it should be specifically stated.

"Later, at the bottom of the paragraph, they use another improper reference when they say:

These consultations will take place prior to the issuance of regulations.

"Again implying there will be regulations. *There will not be in the form that the bill passed the Senate, and there will not be in the form that the bill is placed before the House.*"

5. The Secretary Has Burden of Disproving the Exemptions

p. 9208

"MR. GOODELL. Having established the prima facie case in the Federal Court, the burden itself will shift to the employer to prove or disprove the allegations of the Secretary of Labor. This is the procedure we have in mind. *The employer does not have to prove the exceptions as an affirmative defense.* The burden remains on the Secretary of Labor to prove that the exceptions do not apply. We do not have in mind the Secretary of Labor's going into an establishment and saying, "Look, you are paying the women here $1.75, and the men $2.10. Come on in here, Mr. Employer, and you can prove that you are not discriminating on the basis of sex." That would be just the opposite of what we are doing.

"The Labor Department must prove this, and I think the chairman of the subcommittee has amply verified this point in our exchanges thus far."

6. Final Passage in the House

p. 9218

"The bill was ordered to be read a third time, was read the third time, and passed.

"A similar House bill (H.R. 6060) was laid on the table.

"A motion to reconsider was laid on the table.

"The title was amended to read as follows: 'To probibit discrimination on account of sex in the payment of wages

BLEED THROUGH

by employers engaged in commerce or in the production of goods for commerce.'"

7. Capitulation in the Senate May 28, 1963

p. 9762

"MR. DIRKSEN. Mr. President, if the Senator will yield, I have discussed this question with Senators who normally would have been the conferees on our side had the bill gone to conference. It has also been my privilege and honor to confer with Members of the House who probably would have been the conferees on the minority side. There is a general agreement that the House language is quite preferable to the language contained in the Senate bill. For that reason, I fully subscribe to the motion to concur in the House amendments.

"MR. MCNAMARA. I thank the minority leader for his cooperation.

"THE PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Michigan to concur in the House amendments.

"The motion was agreed to."

SUPREME COURT, U. S.

FILED

MAR 4 1976

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1211

OWENSBORO-DAVIESS COUNTY HOSPITAL, a corporation; CITY OF OWENSBORO, KENTUCKY and DAVIESS COUNTY, KENTUCKY - - Petitioners

versus

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor - - Respondent

Brief For Kentucky Hospital Association *Amicus Curiae*, in Support of Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ—The Equal Pay Act is a Vitally Important Piece of Federal Law, the Proper Interpretation of Which Should Be Settled by the Supreme Court	6
Conclusion	16
Appendix A—Consent to File Amicus Curiae Brief	1a–2a
Appendix B—Court of Appeals Decision Below	3a–39a
Appendix C—District Court Decision Below	40a–46a
Certificate of Service	47a

TABLE OF CITATIONS

	PAGE
Brennan v. Cenco Hospital & Convalescent Homes, Corp., 71 LC 32,908, 21 WH 29 (SD Tex. 1973)..	5
Brennan v. Prince William Hospital Corporation, 503 F. 2d 282 (4 Cir. 1974), Cert. denied, 420 U. S. 972 (1974).	14
Brennan v. St. Luke Hospital, 72 LC 32,969, 21 WH 392 (ED Ky. 1973).	5
Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F. 2d 1256 (5 Cir. 1972)	14– 15
Hodgson v. Good Shepherd Hospital, 327 F. Supp. 143 (ED Tex. 1971).	5
Hodgson v. Kaukini Hospital & Home, 73 LC 32,014 (D. Haw. 1974).	5
Hodgson v. St. Elizabeth Hospital, 70 LC 32,863, 20 WH 1242 (ED Ky. 1973)	5
Hodgson v. Skyvue Terrace, Inc., 68 LC 32,699, 20 WH 754 (WD Pa. 1972).	5
Hodgson v. William and Mary Nursing Hotel, 65 LC 32,497, 20 WH 10 (MD Fla. 1971)	5, 7
Shultz v. Kentucky Baptist Hospital, 62 LC 32,296, 19 WH 403 (WD Ky. 1969)	5

BLEED THROUGH

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No. ———

OWENSBORO-DAVIESS COUNTY HOSPITAL, a Corporation;
CITY OF OWENSBORO, KENTUCKY and
DAVIESS COUNTY, KENTUCKY - - *Petitioners*

v.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, - *Respondent*

Brief For Kentucky Hospital Association *Amicus Curiae*, in Support of Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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The Petitioners, Owensboro-Daviess County Hospital, City of Owensboro, Kentucky and Daviess County, Kentucky (hereinafter collectively called "Petitioners") have requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1975. The *amicus curiae,* the Kentucky Hospital Association, for the reasons hereinafter stated, supports that request and prays that the writ issue. Pursuant to Rule 42 of the Supreme Court's Rules, both the Petitioners and the

Respondent have consented to the filing of this brief by the *amicus curiae*. Copies of the consents appear in Appendix A, hereto.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit not yet reported, and the Findings of Fact, Conclusions of Law and Judgment of the District Court for the Western District of Kentucky, appear in the Appendices B and C hereto, respectively.

II

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 30, 1975. A timely petition for rehearing en banc was denied on December 2, 1975, and the Petitioner's petition for writ of certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III

QUESTION PRESENTED FOR REVIEW

In this action the Secretary of Labor (hereinafter called the "Secretary") alleged that the Petitioners paid female nurses aides at an hourly rate less than male orderlies for "equal work" in violation of the Equal Pay Act of 1963 (hereinafter sometimes called the "Act"). The question for review is as follows:

BLEED THROUGH

> Whether the proper standard for determining "equal work" under the Equal Pay Act of 1963, requires a determination that the affected employees do substantially the same jobs, the performance of which requires equal skill, effort, and responsibility, or a determination that the jobs which the affected employees perform requires substantially the same skill, effort and responsibility?

It is the position of the *amicus* that the proper standard for determining "equal work" under the Equal Pay Act of 1963, requires a determination that the affected employees do substantially the same jobs, the performance of which requires equal skill, effort, and responsibility.

IV

STATUTORY PROVISIONS INVOLVED

The Act was enacted as an amendment to the Fair Labor Standards Act of 1938 adding the principal of equal pay for equal work regardless of sex. The part of the Act involved here is codified in 29 U.S.C. §206-(d)(1) as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment

is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

V

STATEMENT OF THE CASE

The Kentucky Hospital Association (the "Association"), the *amicus curiae,* is a non-profit corporation organized under the laws of Kentucky. One hundred thirty hospitals licensed in Kentucky, are members of the Association, representing in excess of ninety-nine percent (99%) of all Kentucky hospitals. In 1973, those hospitals employed 6,774 female nurses aides, and 1,068 male orderlies, or a ratio in excess of 6 aides to 1 orderly.[1] The Association is an affiliate of the American Hospital Association, a national hospital association. In 1974, 7,174 hospitals were affiliated with the American Hospital Association.[2]

Historically, in Kentucky, and on a national scale, hospitals have employed fewer male orderlies than female aides, historically orderlies have had different, although necessarily related, job functions than aides, and historically orderlies have been paid higher wages

[1]Based on an interpolation of a Wage and Salary survey conducted by the Kentucky Hospital Association of member hospitals for calendar year 1973.

[2]Based on membership information supplied by the American Hospital Association.

BLEED THROUGH

than aides. The difference in wage rates has been based upon job differences—not upon sex differences.

The Secretary brought this action, which is similar to the numerous other actions brought by it in and out of the State of Kentucky, in the United States District Court for the Western District of Kentucky to enjoin the Petitioners from violating the Act's equal pay provisions.[3]

The District Court, without a jury, determined that the Secretary failed to prove that female aides and male orderlies do "equal work". The Court of Appeals reversed the District Court holding that the Findings of Fact were "clearly erroneous" and based upon "an incorrect interpretation of the Equal Pay Act". Implicit in the Appellate Court's reversal of the District Court's Findings of Fact is the Appellate Court's determination that the District Court incorrectly interpreted the law.

The only interpretation of the Equal Pay Act which can be gleaned from the District Court's Conclusions of Law, is that the District Court considered that when males and females perform a different type of work, requiring different skills, the Equal Pay Act is not

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[3]Examples of such cases are reported as follows: *Brennan* v. *Cenco Hospital and Convalescent Homes Corp.*, 71 LC 32, 908, 21 WH 29 (SD Tex. 1973); *Hodgson* v. *Good Shepherd Hospital*, 327 F. Supp. 143 (ED Tex. 1971); *Hodgson* v. *St. Elizabeth Hospital*, 70 LC 32,863, 20 WH 1242 (ED Ky. 1973); *Hodgson* v. *Skyvue Terrace, Inc.*, 68 LC 32,699, 20 WH 754 (WD Pa. 1972); *Hodgson* v. *William and Mary Nursing Hotel*, 65 LC 32,497, 20 WH 10 (MD Fla. 1971); *Shultz* v. *Kentucky Baptist Hospital*, 62 LC 32,296, 19 WH 403 (WD Ky., 1969); *Hodgson* v. *Kaukini Hospital & Home*, 73 LC 32,014 (D. Haw., 1974); and *Brennan* v. *St. Luke Hospital*, 72 LC 32,969, 21 WH 392 (ED Ky. 1973).

violated by differing compensation.[4] On the other hand, the Sixth Circuit did not look to the differences in job duties and responsibilities, but rather made an overall determination of whether, in its judgment, the work performed by aides was "substantially equal work". In other words, it made a management decision which the Equal Pay Act clearly leaves to private enterprise.

VI

REASONS FOR GRANTING THE WRIT

The Equal Pay Act is a Vitally Important Piece of Federal Law, the Proper Interpretation of Which Should be Settled by the Supreme Court.

The Equal Pay Act, in very succinct language prohibits pay discrimination based on sex "for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." It is difficult to understand how these words can be tested under a criteria which only measures whether, in the judgment of the Secretary, or the Court, the work performed by one group of employees is substantially equal to the work performed by another group of employees.

It is not often that the legislative history concerning the choice of statutory wording is as clear as it is in this instance. But here the legislative history clearly demonstrates that the choice of wording was inten-

[4]Findings of Fact, Conclusions of Law and Judgment, "Conclusions of Law" No. 3, Appendix C, p. 45a.

BLEED THROUGH

tional, and it clearly demonstrates the intention that the wording be given common application. Insofar as the proper interpretation of the wording is concerned, a colloquy between Congressman Goodell (Rep., New York) and Congressman Griffin (Rep. Mich.) and Congressman Thompson (Dem., N.J.), three of the managers of the Bill on the House Floor, made very clear the intent of Congress:[5]

> Mr. Griffin: * * *
>
> The first such amendment, it will be recalled was offered by the gentlelady from New York [MRS. ST. GEORGE] who called for the use of the term "equal work" rather than "comparable work." It will be recalled that the House adopted her amendment last year.
>
> This bill today speaks in terms of equal work. We go further in this legislation and provide some definition as to what equal work is—what is meant by equal work. The bill refers to jobs, the performance of which require equal skill, equal effort, equal responsibility, and which are performed under similar working conditions.
>
> MR. THOMPSON of New Jersey. Will the gentleman yield?
>
> MR. GRIFFIN. I yield to the gentleman from New Jersey.
>
> MR. THOMPSON of New Jersey. I am very glad that the gentleman is taking care to explain this. I believe in addition to the gentleman from New

[5]The colloquy is quoted by the Court in *Hodgson* v. *William and Mary Nursing Hotel*, 65 LC 32,497 (MD Fla., 1971) at pages 44,784-44,785.

York [MR. GOODELL] that the gentleman deserves a little credit, too, because this particular section or definition of "equal work" was a bothersome one last year. I think that the contribution which the gentleman made in adding these other factors and, rather specific ones, to it is a most valuable contribution.

MR. GRIFFIN. I thank the gentleman from New Jersey.

MR. GOODELL. Mr. Chairman, will the gentleman yield?

MR. GRIFFIN. I yield to the gentleman from New York.

MR. GOODELL. I also want to commend the gentleman for the very hard work which he did. I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and

BLEED THROUGH

working conditions, is intended to make this point very clear.

MR. GRIFFIN. In other words, would the gentleman agree with me that there would be no basis for comparing, say, an inspector with an assembler, for example? The Department of Labor could not say, "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility." It would be appropriate to compare inspectors with inspectors, or assemblers with assemblers, but not to compare an inspector with an assembler.

MR. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them.

MR. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.

MR. GOODELL. I agree with the gentleman. I wish the gentleman would yield on that point to the chairman of the subcommittee, who made that very point yesterday to the Rules Committee.

MR. THOMPSON of New Jersey. I do agree with what the gentleman said thus far. The gentleman said the Department of Labor could not, where these differences exist, make such determinations. There are two protections. First of all, the Department is not given that broad discretion and is deliberately restricted in the act to the definition set forth in the act.

MR. GRIFFIN. I am very glad to have that important contribution.

MR. THOMPSON of New Jersey. In the event in a very close matter they charge discrimination, it would be incumbent upon them to establish that before a Federal judge. Futher, in the case of inspectors, someone asked hypothetically yesterday, Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

MR. GRIFFIN. I thank the gentleman for that important comment.

MR. GOODELL. I think the point made by the chairman of the subcommittee is important. We discussed earlier the regulatory power. The Secretary may believe that a violation exists but the court will make a second independent judgment. That is very significant. We are not allowing the Secretary of Labor to make decisions which excluded the court from an independent new interpretation of this act, as to whether the words we use are being administered reasonably and properly.

MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it so that this is a negative action rather than a positive one.

MR. GOODELL. I would like to pursue the point about differences in efforts of employees. This is

BLEED THROUGH

perhaps the broadest category we are talking about in comparing jobs.

It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

If I may conclude on just that point: It is our intention, I believe, on both sides of the aisle to provide here with the use of the terms "effort", "skill", "responsibility" and "working conditions" a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

MR. GRIFFIN. So long as pay differentials are not based on sex.

MR. GOODELL. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction. . . .

In the instant case, the Sixth Circuit has misinterpreted the law in exactly the fashion feared by Congress. As each of the three Congressional Managers attempted to make clear, the Equal Pay Act should only be applicable where the jobs involved are "virtually identical"—"alike or closely related to each other"—not merely "comparable." The Sixth Circuit has allowed the Department of Labor to successfully say "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility."

In reaching its decision, the Sixth Circuit first acknowledged its complete adoption of the Secretary's views when it stated (see Appendix B, p. 32a):

> Our interpretation of the Equal Pay Act corresponds to that of the agency charged with its enforcement. Although agency interpretation is not controlling, it is entitled to great weight, and in this instance we find it well-reasoned and persuasive.

From that point forward, the Sixth Circuit never clearly delineates the standard it used in the decision making process, but, the entire tenor of the decision making process is encapsulized in the statement:

> "Appellant [Secretary] has demonstrated that the aides who performed sterile procedures through October 1, 1972, were required to have substantially the same skill, to exert substantially the same effort, and to assume substantially the same responsibilities under identical working conditions" (Appendix B, p. 37a).

BLEED THROUGH

This type of rhetoric sounds fine, but the problem is that it is simply the wrong test, because it puts emphasis on whether the employees have substantially equal capabilities, not whether they perform substantially the same job, *which job requires* equal skill, effort and responsibility. Simply stated, the test applied allowed the Secretary to do the one thing Congress feared, let the Department of Labor say "Well now, these two jobs involve about the same level of skill and the same degree of responsibility"—*ipso facto*—equal work.

The Supreme Court should hear this case because the Sixth Circuit has interpreted a federal law in a clearly erroneous manner. While in the instant case, because aides and orderlies do perform comparable work, the distinction between the proper and improper standard may be subtle in wording, the distinction is devastating in total analytical approach.

The fact that the Sixth Circuit found that orderlies perform some duties not performed by aides, which duties it considered as insignificant, is not nearly as significant as the analytical process utilized by the Sixth Circuit in reversing the District Court on specific findings of fact. The reversals were based on the Sixth Circuit's conclusion that some aides possessed the ability to do work performed by orderlies, or that some work performed by orderlies was (based on the Secretary's lack of evidence) infrequently performed by orderlies. That type of reasoning begs the question. The question is were the jobs of aides and orderlies different, or the same?

The District Court found that the jobs were different. The Sixth Circuit found that aides and orderlies possess substantially the same skill, utilize substantially the same effort, and have substantially the same responsibility. Evidence of individual skill and ability may be relevant in a hiring or promotion discrimination claim, but not in an equal pay determination. The test should not be whether aides and orderlies in fact possess substantially equal skill, utilize substantially equal effort, or have substantially equal responsibility. The test is whether they have equal jobs, and in the performance of the equal jobs they are required to utilize equal skill, effort and responsibility.

The Fourth Circuit has adopted the same test as that announced by the Sixth Circuit. In *Brennan* v. *Prince William Hospital Corporation,* 503 F. 2d 282 (4th Cir. 1974), Cert. denied 420 U. S. 972, the Court's decision turned on the same substantially equal test. There the Court stated, at page 291:

> In sum, the work performed by aides and orderlies is not identical. But, as we have previously held, application of the Equal Pay Act is not restricted to identical work. *Hodgson* v. *Fairmont Supply Co.,* 454 F. 2d 490, 493. The basic routine tasks of the aides and orderlies are equal. The variations that the district court found, when tested by the Act's standard of "equal skill, effort and responsibility," do not affect the substantial equality of their overall work.

The only reported decision which approaches a correct interpretation of the law is *Hodgson* v. *Golden*

BLEED THROUGH

Isles Convalescent Homes, Inc., 468 F. 2d 1256 (5th Cir., 1972) where the Court pointed out, in an aides-orderlies case, that "[i]t is not merely comparable skill and responsibility that Congress sought to address, but a substantial identity of job functions." *Supra.* 1258.

The Act is an important piece of federal legislation. A Circuit Court opinion erroneously interpreting federal law enforced by an administrative agency, not only affects similar parties in that Circuit, i.e. members of the Kentucky Hospital Association, but affects similar parties nationwide, i.e. all hospitals. Proper interpretation of the Act is vitally important in the hospital industry, and it is vitally important to the general well being of the economy.

Legislative history demonstrates a clear intention for a narrow application of the Act. A clear intention of applicability only when the jobs to be performed are equal, not when the Secretary may assess that persons doing comparable work, possess equal skill, utilize equal effort and have equal responsibility. Unless the jobs are equal, it is not within the province of the Secretary, or the Courts, to decide that persons possessing equal skill, effort and responsibility should be paid equally. That is an economic determination, decided by economic factors.

VII

CONCLUSION

In its *amicus* brief the Kentucky Hospital Association has addressed itself to the one issue raised by Petitioners concerning which the Kentucky Hospital Association has a major interest. The Kentucky Hospital Association believes, however, that all issues raised by the Petitioners are important and should be considered by this Court.

For the reasons herein stated, it is urged that a writ of certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

EDGAR A. ZINGMAN
J. LARRY CASHEN
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Amicus Curiae

BLEED THROUGH

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APPENDIX A

Seal **OFFICE OF THE SOLICITOR GENERAL**
Washington, D.C. 20530
February 25, 1976

J. Larry Cashen, Esq.
Wyatt, Grafton & Sloss
Twenty-Eight Floor—Citizens Plaza
Louisville, Kentucky 40202

Re: Owensboro-Davies County Hospital, et al.
v. Brennan (C.A. 6)

Dear Mr. Cashen:

In response to your letter of February 19, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the Kentucky Hospital Association.

Sincerely,

(s) Robert H. Bork
Solicitor General

[**SANDIDGE, HOLBROOK, & CRAIG LETTERHEAD**]
Attorneys at Law
Owensboro, Kentucky 42301

February 20, 1976

Hon. J. Larry Cashen
Wyatt, Grafton & Sloss
28th Floor, Citizens Plaza
Louisville, Ky. 40202
Dear Mr. Cashen:

Re: Owensboro-Daviess County Hospital et al. v.
Peter J. Brennan, Secretary of Labor

This is to evidence the consent of the petitioner, Owensboro-Daviess County Hospital, the City of Owensboro and Daviess County, Kentucky, to the Kentucky Hospital Association's filing an amicus curiae brief in the United States Supreme Court in support of the hospital's petition for a writ of certiorari. The petition will be mailed to the Supreme Court on February 24, 1976.

Sincerely yours,

(s) Ronald M. Sullivan
Attorney for the Petitioners,
Owensboro-Daviess County
Hospital, et al.

RMS/sp
P.S. Enclosed is a copy of our petition for certiorari.

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APPENDIX B

No. 73-1261

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellant,
v.
OWENSBORO-DAVIESS COUNTY HOSPITAL, a Corporation; CITY OF OWENSBORO, KENTUCKY; and DAVIESS COUNTY, KENTUCKY,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed September 30, 1975.

Before: WEICK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from a judgment determining that appellees' practice of paying higher wages to "male nursing assistants"[1] than those paid to "nurse assistants" who are female does not violate the

[1]The titles of "male nursing assistant" and "nurse assistant" are the official designations for hospital personnel commonly known as orderlies and aides respectively.

Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1), (3)[2] because the wage differential was justified by differences in skill, effort, and responsibility and by dissimilarities in working conditions.[3] This appeal requires us to examine the district court's findings of fact to determine whether they are supported by the evidence, and whether they permit, as a matter of law, its conclusion that male nursing assistants are required to exert substantially greater effort, to employ substantially greater skills, and to assume substantially greater responsibility than nurse assistants.

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[2]Section 206(d) of Title 29 provides in relevant part:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

[3]In *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 202 (1974), the Supreme Court, in defining the term "working conditions," held:

> . . . the element of working conditions encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. [Foototes omitted.]

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The action was brought by the Secretary of Labor in the fall of 1971 against the Owensboro-Daviess County Hospital (the hospital), the City of Owensboro, and the County of Daviess to enjoin them from violating the Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (1), (3) by paying higher wages to "male nursing assistants" (orderlies) than are paid to female "nursing assistants" (aides), and to restrain them from withholding payment of past wages due under the Act.

The hospital is a not-for-profit Kentucky corporation located in Owensboro, Daviess County, Kentucky, and is operated by the City of Owensboro and the County of Daviess through an appointed Board of Management. The parties have stipulated that appellees constitute an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that consequently the employees of the hospital are entitled to whatever protection and benefits the Equal Pay Act affords. The period covered by this action, based upon the complaint and by agreement of the parties, is from April 5, 1968, to the date of the commencement of trial, October 31, 1972. The discrimination charged is not limited to any department of the hospital.

During the period covered by this action, the hospital regularly employed approximately 30 to 40 orderlies and approximately 160 to 180 aides. As a general rule, each of the four floors of the 462 bed hospital was divided into four nursing stations and, depending on the shift, two or three "nurse assistants" were assigned to each station and one or two "male nursing assistants" were assigned to each floor.

After the presentation of the Secretary's evidence, the district court, *sua sponte*,[4] directed a verdict for appellees

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[4]The transcript of the trial discloses the following conversation among the court and counsel:

Mr. Steiner: Uh, the Plaintiff closes, Your Honor.

(Footnote continued on following page)

and thereafter made the following findings of fact: (1) that the job descriptions for aides and orderlies revealed substantial differences in duties and that these descriptions accurately portrayed differences in the actual duties performed; (2) that a typical aide, unlike a typical orderly, spent substantially all her time at the hospital in routine patient care; (3) that orderlies, unlike aides, received special training in sterile procedures and techniques, in removing casts, and in setting up traction; (4) that aides were closely supervised, while orderlies exercised discretion in performing their duties, particularly in responding to "stat" or emergency calls; (5) that orderlies, unlike aides, were responsible for the care of violent or potentially violent patients; (6) that orderlies, because of their fewer numbers, were required to do post-mortem work more often than the aides; (7) that the orderlies' work was continuous, demanding and tiring, and that the frequent emergency calls caused tension and strain while aides' duties involved much less tension and strain; (8) that orderlies had less time for relaxation during working hours than aides did; and (9) that the orderlies' work was more arduous than that of aides and required more physical effort and strength.

On the basis of these findings, the district court concluded not only that the Secretary had failed to establish that the tasks performed by aides and orderlies were substantially equal, but also that aides and orderlies performed substantially different jobs under substantially different working conditions, and that the duties of a typical orderly

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(Footnote continued from preceding page.)

By the Court: Plaintiff closes?

Mr. Steiner: Yes, Your Honor.

By the Court: I'll sustain a motion for a directed verdict without argument, and you will redraw your findings—proposed findings and conclusions.

Mr. Lovett [For the Defendants]: Yes, Your Honor.

By the Court: . . . All right, Mr. Marshall; we stand in recess.

BLEED THROUGH

required greater skill, effort and responsibility than did the duties of a typical aide. Accordingly, the district court concluded that the higher wages paid to orderlies were justified, and that appellees had not, therefore, violated the Equal Pay Act.

A careful examination of the record convinces us, however, that the critical findings of fact upon which the district court based its conclusions are clearly erroneous. The job descriptions for aides and orderlies did not differ significantly for most of the period covered by this action. Moreover, the record shows, contrary to the findings made by the district court, that some aides, as well as orderlies, were trained to do sterile procedures and did them on a regular basis; that aides as well as orderlies lifted heavy patients, restrained unruly ones, and responded to emergency calls; and that aides had less free time than orderlies did. In addition, although the record discloses that as a general rule orderlies and not aides set up traction and assisted in removing casts, these duties were performed so infrequently that they did not render the jobs of aides and orderlies substantially different. Finally, although orderlies may have, on the average, done more post-mortem work than aides did, this modest difference does not justify the higher wages paid to orderlies.

JOB PREQUISITES, TITLE, AND TRAINING

The employment prerequisites for the jobs of aides and orderlies were precisely the same during the period in question: (1) a diploma from an accredited high school; (2) good moral behavior; (3) good health, and (4) a recommendation of character. In addition, as we have already observed, in the job description bulletins issued by appellees, the formal titles, "nurse assistants" and "male nursing assistants," are virtually identical except for the designation "male" in the latter. Moreover, aides and orderlies at-

tended the same introductory four week training course and, with one exception,[5] received identical instruction.

At the same time, however, appellees maintained one wage scale for male nursing assistants and another lower scale for nurse assistants. Although both scales provided for higher wages based upon experience, a male nursing assistant begins working and continues to work at a wage higher than that paid to a nurse assistant with comparable experience.[6]

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[5]Aides hired after October, 1968, received no training in catheterization procedures.

[6]The wages received by aides and orderlies during the period of time at issue were as follows:

ORDERLIES

	Min.	3 Mos.	6 Mos.	1 Yr.	1½ Yrs.
11-13-66	$1.30	$1.45	$1.55	$1.60	$1.75
9-14-67	1.40	1.55	1.65	1.70	1.85
9-15-68	1.50	1.65	1.75	1.80	1.95
9-15-69	1.65	1.80	1.90	1.95	2.10
	Min.	3 Mos.	9 Mos.		
9-27-70	1.85	2.10	2.30		
12-19-71	2.00	2.25	2.45		

NURSE ASSISTANTS

	Min.	3 Mos.	6 Mos.	1 Yr.	1½ Yrs.	Special	
11-13-66	$1.20	$1.25	$1.30	$1.35	$1.40	$1.48	
9-14-67	1.30	1.35	1.40	1.45	1.50	1.58	
						2 Yrs.	Special
9-15-68	1.40	1.45	1.50	1.55	1.60	1.65	1.70
9-15-69	1.55	1.60	1.65	1.70	1.75	1.80	1.85
	Min.	3 Mos.	9 Mos.	Special			
9-27-70	1.70	1.85	2.05	2.10			
12-19-71	1.85	2.00	2.20	2.25			

Number of Orderlies		Number of Nurse Assistants
9- 2-67	25 including 1 part-time	162
3-31-68	29 including 2 part-time	163
10-12-68	31 including 4 part-time	160
4-12-69	31 including 4 part-time	160
2-14-70	31 including 3 part-time	179
4-11-70	29 including 4 part-time	180
10- 1-71	32 including 4 part-time	180
9-28-72	38 including 8 part-time	180 full-time 10 part-time

(Footnote continued on following page)

BLEED THROUGH

JOB DESCRIPTIONS

Although job descriptions should not be accorded as much weight as that given to the duties actually performed by employees in determining whether two jobs are substantially equal, nevertheless, we believe that they may be helpful, particularly where the descriptions of the jobs to be compared are similar and were written by the very employer who claims that wage differentials are not based on an impermissible criterion.[7] *Cf. Corning Glass Works* v. *Brennan*, 417 U. S. 188, 203 (1974).

In this case, we observe that in both the January, 1969, and the January, 1972, job description bulletins issued by appellees, the primary duty of a nurse assistant appears virtually identical to that of a male nursing assistant: a nurse assistant "[a]ssists the Professional Nursing Staff by performing duties in caring for patients," while male nursing assistants "[a]ssist the Nursing Staff in performing duties in caring for patients." These bulletins also state that both aides and orderlies are responsible to the professional nursing staff, the former to the unit supervisor of nursing service, and the latter to the charge nurse.

(Footnote continued from preceding page.)

One aide who worked in the obstetrics ward of the hospital testified that she received the special pay indicated in the chart. The record does not contain an explanation for her special pay. However, even aides who received special pay were paid wages lower than those paid to orderlies with the same length of employment.

[7]We agree with the Secretary of Labor that "[a]pplication of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance." 29 C.F.R. §800.121 (1974). Therefore, if there were a conflict between job description bulletins and actual duties performed, the latter would be determinative of the existence *vel non* of a violation of the Equal Pay Act.

THE 1969 BULLETIN

The detailed job descriptions of aides and orderlies found in the 1969 bulletins are virtually identical, and the differences disclosed are insignificant for the purposes of the Equal Pay Act. According to these bulletins, both aides and orderlies take and record temperature, pulse and respiration; both take blood pressure; both give cleansing and therapeutic baths, and orderlies finish all the baths on male patients; both give enemas; both do sterile procedures including catheterizations, catheter irrigations, bladder installations and irrigations;[8] aides apply hot and cold compresses under supervision, clean and apply colostomy dressings on permanent cases under supervision, and give back care to all patients who are bedridden, while orderlies apply dressings, compresses, or medication to the penis and scrotum, and change colostomies on permanent cases; aides apply hot water bottles and ice bags, while orderlies fill and apply hot water bottles and ice bags; both have post-mortem duties; both discontinue subcutaneous injections and I.V.'s under supervision; both issue and empty bedpans, and collect urine and fecal specimens; both keep records of a patient's intake and output; both assist in preparing patients for surgery; both report observations and complaints of patients to the nurse in charge; aides are required to insure that all patients are clean and dry before leaving their units, while orderlies are required to make sure that all male patients on the floor to which they are assigned are dry before going off duty; and aides weigh ambulatory patients and assist in weighing bedridden patients, while orderlies weigh bedridden patients.

---

[8]It is interesting to note that even though aides hired after October, 1968, received no training in catheterization procedures, the job description bulletin for aides revised in June, 1969, still listed catheterizations as a duty performed by aides. Some time later, this duty was deleted.

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According to the 1969 bulletins the following differences exist in the jobs of aides and orderlies: aides give perineal care while orderlies do all treatments of the penis and scrotum; aides assist male and female patients with urinals and bedpans while orderlies check for "due-to-voids"; aides assist patients in and out of bed and turn patients who are unable to turn themselves, while orderlies help patients get out of bed, walk them and help to turn them; aides assist in admitting patients to the hospital, transferring them within the hospital, and discharging them from the hospital, while orderlies help to admit male patients and to transfer and discharge patients; aides are required to answer signal lights promptly, while orderlies are required to answer signal lights immediately and to respond to page calls; aides help to start and to discontinue oxygen therapy, while orderlies set up and put oxygen in use when necessary; aides are required to insure that patients have fresh water at all times and to change thermometers for patients staying longer than a week, while orderlies must keep ice carts filled; aides clean the dressing cart and medicine room under supervision, and clean the utility room, treatment room and kitchen, while orderlies help keep the linen room neat and the utility room clean by cleansing enema and catheter trays; aides report any out-of-order or broken equipment to the nurse in charge, while orderlies are required to keep the emergency oxygen equipment in working order and to take care of their own equipment. In addition, aides make beds, serve meal trays, feed patients if necessary, remove water pitchers from the rooms of N.P.O. patients after midnight, and make sure that patients who are scheduled for diabetes or blood sugar tests have water only. Orderlies must, in addition to the duties already described, check and obtain linen for their shifts, including the packs to make up beds when patients are discharged.

THE 1972 BULLETIN

In January, 1972, shortly after this suit was filed, these job descriptions were amended to include for both aides and orderlies the duties of making beds, serving food trays, performing clini-tests and acetests, and applying binders. The new job description added for aides the duty of measuring, describing, and emptying the contents of Gomco suction and urine drainage bags. For orderlies, the new job description added the duties of assisting in restraining patients, pursuing runaway patients, bringing oxygen tanks from the basement, cleaning up minor spills, assisting in applying, cutting, and removing casts, inserting rectal suppositories, and assisting with cardiac massage.

It is apparent that at least through January, 1972, most of the time period covered by this lawsuit, the job descriptions for aides and orderlies were virtually identical. From January, 1972, until the date of trial, the job description for orderlies added duties apparently not performed by aides that required effort (restraining unruly patients, pursing eloping patients, and bringing oxygen tanks from the basement of the hospital), skill and responsibility (cast work and assisting with cardiac massages) greater than or, at least, different from the skill, effort and responsibility required of aides. These additional tasks, according to the hospital administrator, were not new but traditionally had been performed by orderlies. In addition, the 1972 bulletin describing the tasks assigned to aides no longer listed varions sterile procedures.

ACTUAL DUTIES PERFORMED

The district court, in addition to making more particularized findings of fact about duties actually performed, also made what might be called a general finding of fact as follows:

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> The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answering requests for small personal needs.
>
> The typical orderly spends a very small part of his working time in . . . routine patient care . . . but spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing[s], setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls) and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects.

In determining whether these differences existed and whether they are significant we focus on the differences that the district court found to exist: sterile procedures, lifting heavy patients, controlling unruly patients, "stat" calls, free time, setting up traction, obtaining oxygen tanks, removal of casts, and post-mortem tasks.

STERILE PROCEDURES

The district court, apparently relying solely upon the testimony of the hospital administrator, made the following finding of fact concerning the performance of sterile procedures:

> At all times, orderlies have been trained in Sterile Techniques, which requires [sic] substantial skill, and includes [sic] catheterization, catheter irrigation, rectal suppositories, TUR dressing change, and bladder irrigation. Since October of 1968, aides have received no training in Sterile Techniques. A typical orderly in

> a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon the patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides.

A careful examination of the record demonstrates that this finding of the district court is clearly erroneous in a crucial respect: until October 5, 1972, aides performed virtually all catheter irrigations and catheterizations of females.

Although the hospital administrator did testify that aides have not received training in sterile techniques since 1968 and that in October, 1968, a directive was issued commanding that aides previously trained to do catheterizations should cease doing them, he also admitted that aides might have continued to do these sterile procedures after 1968. The reason for this change of policy, he explained, was that a number of doctors wanted sterile procedures to be performed only by professional medical personnel, that is, by Registered Nurses and Licensed Practical Nurses, not by nonprofessional aides.[9] The hospital administrator also testified that at least six orderlies, three in the x-ray section of the hospital, two in physical therapy, and one in central supply, performed no sterile procedures at all.

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[9]It is anomalous that the concern of the hospital did not extend to male patients who, of course, were catheterized and had other sterile procedures performed upon them by non-professional orderlies.

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Despite the hospital's decision to discontinue the training of new aides to do sterile procedures, and despite the hospital's announced policy not to permit aides already trained to perform these tasks, the 1969 job bulletin for aides, effective until 1972, listed "sterile procedures" including catheterizations and catheter irrigations as duties. More importantly, aides Catherine Bryant, Dorothy Crump, Elizabeth Wilhite, Josephine Hatfield, Mary Pauline Wathen, and Ruby Davis; Licensed Practical Nurse, Susan Wink; and Registered Nurses Norma Ward, a unit supervisor, and Katherine Wathen, the evening supervisor of the hospital, all testified that aides previously trained continued to do sterile procedures on a regular basis until a few weeks before the commencement of trial. The sterile procedures performed by aides on a regular basis until just prior to trial included catheterizations, catheter irrigations, bladder installations and irrigations of females, and reinforcement of dressings and eye soaks. Even after the new October, 1972, directive was issued, one aide, relying on it, was reprimanded when she failed to do a catheterization ordered by a Licensed Practical Nurse and was instructed to obey any future orders.

In light of this evidence, we hold that the finding of the district court that aides rarely, if ever, performed sterile procedures, particularly catheterizations and catheter irrigations until the commencement of trial, is clearly erroneous.[10]

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[10]Since at least six orderlies performed no sterile procedures, and a number of aides did perform these tasks, we need not decide whether the district court was correct in its determination of the number of catheterizations and catheter irrigations that a typical orderly performed on a typical day, and the time required to perform them. We observe, however, that the minimal evidence introduced respecting this question came primarily from an orderly who contradicted himself not only about the number of catheter irrigations and catheterizations he performed each day, but also about the length of time it took him to perform them. Although

(Footnote continued on following page)

LIFTING HEAVY PATIENTS

The district court, in its general finding of fact, apparently concluded that aides did not have the duty of lifting heavy patients, because he indicated that this task was one that distinguished the duties of orderlies from those of aides. The evidence, however, indicates that, as a rule, aides and orderlies helped each other to lift heavy patients. Dorothy Crump, an aide, testified that although an orderly usually assisted a patient in getting on his crutches and *helped* to weigh heavy patients, she would sometimes summon an aide and sometimes an orderly to *assist her* in lifting a heavy patient. Elizabeth Wilhite, an aide, testified that she needed help almost daily in lifting heavy patients and that she would call either an orderly or an aide to *assist her.* Josephine Hatfield, an aide, testified that orderlies usually *helped her* to lift heavy patients but that if an orderly were not available, she would obtain assistance from another aide. Although orderlies single-handedly lifted heavy patients, particularly when bathing male patients, aides also lifted female patients single-handedly except when they were either extremely heavy or uncooperative.[11]

(Footnote continued from preceding page.)

testifying that he did perhaps five or six catheterizations each day, he also admitted that sometimes he did only two or three Foley catheterizations each week; that a Foley probably took him longer than other kinds of catheterizations, and that a Foley catheter could be inserted in only ten minutes. And, although he testified that it might take him as long as 45 minutes to do a catheter irrigation, he recalled having told counsel for appellant that a Foley irrigation many times took only a few seconds. The other orderlies did not indicate how often they performed, or how long it took them to perform sterile procedures, and one of them stated that he did nothing that aides did not do.

[11]One aide who worked in the obstetrics section of the hospital testified that she was often required to lift patients who were paralyzed from the waist down. In 1971, she received the "special

(Footnote continued on following page)

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We hold, therefore, that the finding of the district court that orderlies but not aides lifted heavy patients is clearly erroneous.

STAT CALLS

In contrasting the assignments of aides and orderlies, the district court found that:

> [t]he typical aide is assigned to a fixed number of patient rooms, and number of patients therein, at an assigned duty station. The typical orderly is not assigned to any one duty station, or even to one certain floor, but is required to answer calls throughout the hospital, known as Stat calls, many of which arise from emergencies. The orderly is free from supervision and must exercise discretion and decision making in determining whether to respond and go to a call at another location, or to continue the performance of the duty upon which he is then engaged. The Stat calls frequently require the orderly to hurry to meet an emergency, upon which not infrequently life itself depends.

This finding of the district court gives the impression that the orderlies were constantly hurrying about the hospital in response to stat calls, and that patient lives often depended upon their prompt response. The evidence, however, affords little support either for the district court's finding or for the inferences that could be drawn from the finding. Denford Morris, an orderly, testified that he was assigned to the third floor, specifically to two stations on that floor, and that he received approximately one stat call per week, and that the last stat call he had

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(Footnote continued from preceding page.)
wage'' of $2.25 per hour. This was, however, still twenty cents less per hour than the wage received in 1971 by orderlies with only nine months experience.

received was approximately two weeks before. The purpose of this call, he thought, was "probably" to take a patient to the coronary care unit, but by the time he had arrived four or five other orderlies were already present, so that he was not needed. He also testified that he received stat calls to do catheterizations of males. Kenneth Thomasson, an orderly from 1969 to 1971, testified that he had been assigned to the third floor most of the time; that he went to other floors in response to stat calls, but that aides were already present by the time he arrived. Norma Ward, a registered nurse and a unit supervisor, testified that orderlies received stat calls "pretty often" but that many of these calls were occasioned by a male needing to use a urinal or to be catheterized. Katherine Wathen, the evening supervisor of the hospital, testified that orderlies rarely received stat calls on her shift and rarely received two stat calls at once. When one did receive simultaneous calls, she indicated that he usually made up his own mind about where to go first. However, Susan Wink, a registered nurse, testified that when stat calls were made, the station where the orderly was working would call the station initiating the call, ask the purpose of the call and whether the orderly was needed immediately.

Although aides do not have to respond to stat calls and rarely have to "travel" (one aide testified that she had traveled several times the previous week), aides do have to respond to lights turned on by patients for any number of reasons. Catherine Bryant, an aide, testified that aides have to answer lights all the time, that sometimes there are not too many, that at other times they are going on right up until the time their shifts end, and that still at other times answering patient lights required them to work past the time their shifts ended. She also testified that when patients turned on their lights, they usually wanted a bedpan, or medication for pain, and that males often wished to

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use a urinal. When an aide received the last-mentioned request, she would initiate a stat call if an orderly were not available on the floor, and if he were occupied elsewhere in the hospital and could not come to assist the male patient, the aide would assist him herself. Elizabeth Wilhite, who worked in the orthopedic section of the hospital, also testified that patient lights were turned on frequently and that it was not unusual to have four or five patient lights go on all at once on her station. It should also be observed that when an aide sees two light go on simultaneously, she has to choose which to respond to first, and that her decision takes into account the nature of the patient's illness and the urgency of his circumstances.

In light of this evidence, we conclude that the district court's finding that the typical orderly, in contrast to the typical aide, was not assigned to one floor and that he frequently had to hurry in response to stat calls in order to meet an emergency upon which life not infrequently depended is clearly erroneous. To the extent that the district court found that orderlies had to meet emergencies while aides did not, we find that this is also clearly erroneous because the record demonstrates that aides had to respond to lights, that as a consequence of these lights they sometimes initiated stat calls, and that aides were already present by the time an orderly arrived after being paged. Therefore, to the extent that orderlies responded to emergency situations, aides did also.

FREE TIME

The district court found that:

> [t]he work of the orderlies is continuous, demanding and tiring, and the emergency calls are frequently hard on the nerves of the orderly. The orderly has very little time for rest or relaxation during his working time. The aides perform work under much less tension and strain, and have more opportunity for rest and relaxation during the work day.

There was very little testimony given regarding the amount of free time aides and orderlies have. The little testimony that there was, however, indicates that aides have less free time than do orderlies. Although orderlies have regularly scheduled duties and do have to respond to stat calls approximately one time a week, aides seem to be in virtually continuous motion making beds, serving trays, giving baths, performing sterile procedures, cleaning equipment, and a host of other activities, including responding to patient lights. Kenneth Thomasson,[12] an orderly, testified

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[12]The only testimony about the tension under which non-professional assistants to the nursing staff worked was given by Kenneth Thomasson, who stated in response to questioning:

Q. Why did you leave the hospital?
A. Looking for a better job.
Q. You didn't like the work out there?
A. I liked it as well but it was hard on my nerves.
Q. Why was it hard on the nerves?
A. I just got too involved with the people, I guess.
Q. Uh, you got "stat" calls?
A. Yes, sir.
Q. Did you have to hurry when you got 'em?
A. Yes, sir.
Q. When you got there did you find people in trouble sometimes?
A. Yes, sir.
Q. Was that hard on your nerves?
A. Well, the rush is; right at the time you have—uh, it's happening it doesn't bother you so much and then after it's over with I think about it, it kind of bothers.

The foregoing testimony, in response to leading questions, suggests that Thomasson may be a sensitive person more troubled seeing patients who were very ill than by having to respond promptly to stat calls. He subsequently became employed at a doughnut shop.

No aide testified directly about the tension resulting from responding to patient lights and performing other duties, although one aide stated that sometimes she was kept running all day. The imprecise testimony about tensions particularized to orderly Thomasson, and the absence of testimony about tensions experienced by the typical orderly and aide, demonstrates that the finding that aides "perform work under much less tension" than orderlies do is without evidentiary support and therefore clearly erroneous.

BLEED THROUGH

that he did have free time although the amount varied with the shift he was working on. On the day shift, he had very little free time, from "three to eleven you have slack times on up in the night and eleven to seven you've got a lot of slack time." Denford Morris, who worked on the day shift, testified that orderlies might have a little free time sometimes. Dorothy Crump, an aide, testified that aides don't have much free time. Katherine Wathen, the evening supervisor of the hospital, testified that orderlies have more free time than aides do.

In light of this testimony, we conclude that the district court's finding that aides have more free time than orderlies do is clearly erroneous. The evidence indicates at a minimum that aides and orderlies have approximately the same amount of free time, and it may fairly be said that the evidence indicates that orderlies have more free time than aides do.

We conclude, contrary to the district court, that the differences in wages paid to the orderlies and aides cannot be justified by its finding that orderlies alone performed the additional duties of removing casts, setting up traction, and carrying oxygen tanks from the basement. These additional duties were not performed by all orderlies and consumed only a negligible portion of the workday of those orderlies who undertook them. *See, e.g., Brennan* v. *Prince William Hospital Corp.*, 503 F. 2d 282 (4th Cir. 1974), *cert denied*, 43 U.S.L.W. 3495 (March 18, 1975), *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041 (5th Cir.), *cert. denied*, 414 U. S. 822 (1973), *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490 (4th Cir. 1972), *Shultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356 (8th Cir. 1970), *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3d Cir.), *cert. denied*, 398 U. S. 905 (1970). The last three cases were cited with approval by the Supreme Court in its recent decision *Corning Glass Works* v. *Brennan, supra*, at n. 24.

The testimony regarding these additional tasks is as follows:

REMOVAL OF CASTS

The district court found that:

> [t]hroughout the hospital, but particularly in the orthopedic section, the typical orderly exercises the skill of cutting a cast where the physician has directed, and the orderly is trained by the physician to do this. There is no evidence that the aide is trained at all to do this, or ever performs this function. The cutting of casts requires a different and additional skill by the orderly.

We agree with the district court that there is no evidence in the record to indicate that an aide has ever cut a cast at the direction of a physician. However, there is also no evidence to support his finding that a typical orderly exercises the skill of cutting casts with any regularity. Orderlies stationed in the orthopedic section may do this on a somewhat regular basis, but these orderlies can not be considered typical. Denford Morris, an orderly who has been assigned to the third floor since 1967 or 1968 testified that he had cut only one cast from that time until the time of trial. The other orderlies who testified did not indicate whether they had ever cut a cast. In addition to holding that the district court's finding that a typical orderly exercises the skill of cutting a cast is clearly erroneous, we also hold that the cutting of one cast over a period of four or five years does not sufficiently distinguish the jobs of aides and orderlies to justify a pay differential. *See, e.g., Hodgson* v. *Behrens Drugs Co., supra, Hodgson* v. *Fairmont Supply Co., supra, Shultz* v. *American Can Co.—Dixie Products, supra.*

BLEED THROUGH

TRACTION

The district court found that:

> [w]hen traction is required to be set up in the hospital, the typical orderly assigned must know the various types of traction, and how to set up the apparatus, and routinely perform this function. The aide may from time to time take a patient in or out of traction, add or remove weights; but does not have the knowledge or exercise the skill just described for the orderly. In addition to the skill, the setting up of traction requires the lifting of heavy weights and requires substantial exertion by the orderly.

The record does indicate that the usual practice at the hospital is for orderlies to set up traction, when necessary, and for aides to change the weights on traction and to take patients in and out of traction for exercise. Denford Morris, an orderly who worked on the surgical floor, stated, however, that he set up traction only infrequently. His estimate varied from an average of once or twice a month to a possibility of two to three times a week. He testified that it might take as long as thirty minutes to get the equipment from the orthopedic section of the hospital, set it up and place the patient in it. Norma Ward, a supervisor of the medical unit, testified that in her section, orderlies set up traction: but that her section required traction equipment only on an irregular basis, approximately two or three times per month. Kenneth Thomasson, an orderly who worked on the medical floor of the hospital, also testified that traction equipment was needed only infrequently, that he rarely set up traction, and that aides sometimes helped him do it. Appellees also elicited the following testimony from him:

> Q. And you have to know what kind of traction to get and what you're doing to set it up, don't you?

A. Right.

Q. And Aides don't do—don't know that, do they?

A. Well, most of 'em know more about it than I did.

Perhaps the most revealing testimony about the ability of some aides to set up traction, and whether, in fact, they performed this task, came from Elizabeth Wilhite, an aide who had been assigned to the orthopedics section of the hospital for thirteen years:

Q. Uh, describe how your work involves traction?

A. Well, naturally, I put it on, and when I first started there, I'd trail along after Mike Livers uh, he's an Orderly that has retired, 'till I learnt traction, because I wanted to learn, and I've set up traction such as Buchs Traction and such as cervical traction, but now, the Ninety-nine Traction, I've never done that because it's not ordered too often. I think it's been ordered once or twice since I've been there.

Q. Have you ever had occasion to show anyone else how to do traction?

A. Yes, sir.

Q. Uh, who?

A. Jim Johnson, a little Orderly that came in—it hasn't been too long—too many weeks ago, and he was on our station the other afternoon and our regular Orderly wasn't there.

Q. When was this?

A. This was about a week before last, or two weeks ago; something like that.

Q. Okay; and what happened?

A. Well, I was told to go back and show him and help him, how to put this traction on.

Q. Uh, who told you to do that?

A. An RN.

BLEED THROUGH

On cross-examination by appellees, Elizabeth Wilhite gave the following testimony:

Q. Now, when was the last time that you set up traction; you got the equipment and you set it up, a Buchs Traction or a cervical traction?

A. This was a Buchs Traction.

Q. When was the last time?

A. It was about a week and a half ago . . .

Q. Now then, who—what classification uh, is it Orderlies who set up that traction, nearly all of those tractions?

A. Yes, sir.

Q. It is not the Aides that set up that traction, are they? It is the Orderlies?

A. Well, we help with it. You mean these big frames that you pack and put over the beds; yes, sir; we help the Orderlies. They could not do it by themselves, no more than we could do it by ourselves.

Q. Are they heavy?

A. Yes, they're heavy.

Q. Does—which one is the one that has the responsibility of doing the lifting and doing the heavy work, the Aide or the Orderly?

A. Well, the Orderly is on one end of the frame and we're on the other end of the frame.

Q. And you [do] just as heavy work as the Orderlies; is that what you're telling?

A. I would have to.

Q. Are you telling the Court that that's what you're doing?

A. I would have to lift as much as he did. If we—if I didn't the frame would go down on my side.

Q. Do you lift up the bed and put it on blocks sometimes in setting up that traction?

A. I have helped lift up the beds, yes, sir; and I have helped also put the blocks under them.

She also testified that there was at least one other aide in the orthopedics section who had set up traction.

In light of the foregoing testimony, we conclude that orderlies set up traction on such an infrequent basis that this duty cannot justify a higher wage. We also conclude that because there were aides who were also qualified to perform this duty, this task cannot be regarded as a distinguishing characteristic of the job of orderly. *See, e.g., Brennan* v. *Prince William Hospital Corp., supra, Hodgson* v. *Behrens Drug Co., supra, Hodgson* v. *Fairmount Supply Co., supra, Shultz* v. *American Can Co.—Dixie Products, supra, Shultz* v. *Wheaton Glass Co., supra.*

OXYGEN TANKS

The district court, in distinguishing the jobs of aides and orderlies, found that orderlies brought heavy oxygen tanks from the basement of the hospital, and, by negative implication, found that aides did not. The record indicates that as a general rule, orderlies brought oxygen tanks from the basement when necessary and that aides started the oxygen. However, all rooms in the hospital were equipped with oxygen, and the only time that it was necessary to bring oxygen tanks from the basement was when the hospital had an overflow of patients who were placed in the halls and needed oxygen. None of the orderlies who testified indicated that he had ever brought an oxygen tank from the basement. Moreover, it appears that aides were able to perform this task. Aides Josephine Hatfield and Susan Wedding both testified that they had procured oxygen tanks from the basement when necessary.

Accordingly, we determine that although orderlies may have carried oxygen tanks from the basement, the task was an infrequent one that aides were also capable of performing. Accordingly, this duty does not significantly distinguish the job of aides and orderlies, and does not justify higher wages for orderlies.

BLEED THROUGH

UNRULY PATIENTS

The district court found that

> [t]he hospital has two rooms for violent patients, and these rooms are almost always in use. In addition, the hospital from time to time has alcoholic, narcotic, and other patients who are not routinely safe to themselves or other patients or personnel. The orderly has the responsibility for almost all care to those patients, which is performed under a less satisfactory working condition.

In so finding, the court apparently relied upon the testimony of the hospital administrator and that of Denford Morris, an orderly. However, although the hospital administrator testified in his deposition that orderlies are responsible for restraining violent patients and for sitting with patients "who are in custody of the law, where an aide does not," he also conceded that aides might assist orderlies in restraining patients on occasion. Denford Morris testified that unruly and violent patients are kept in special rooms and that orderlies have to "go down and help restrain them . . . ." When he was asked how often he had been required to do this, he testified that "it doesn't happen real often with us . . . . [M]aybe a time or two or such matter [each month]." He also testified that most of the time the lock-up rooms are in use, and that most of the nursing care to patients in these rooms was "probably" given either by an orderly or someone assisted by an orderly.

This testimony, however, was contradicted by Ruby Davis, an aide assigned to a station with a lock-up room, who was the only person whose testimony regarding the nursing care actually performed was based upon direct knowledge. She testified that she handled unruly patients about once each week, assisted by whoever was available

including aides, orderlies and supervisors. She added that when she performed services for these patients, such as taking blood pressure, an orderly or sometimes an aide would stand guard. Catherine Bryant, an aide, testified that aides summoned orderlies *to assist them* in restraining patients *only if* they became very unruly; that aides and orderlies worked together in restraining violent patients; and that during her fifteen years at the hospital she never saw an orderly get into a "scuffle" with a patient. Aide Dorothy Crump testified that when her patients became unruly she would sometimes summon an aide and sometimes an orderly to assist her. Finally, Josephine Hatfield, an aide, testified that orderlies did not look after violent patients more than aides.

Our examination of testimony of both aides and orderlies convinces us that there is insufficient, if any support, for the finding that orderlies performed most of the nursing care for unruly patients. Even if some orderlies were exposed more often to dangerous patients than some aides were, the orderlies' exposure to greater risk did not occur with sufficient frequency or take up a sufficiently large portion of their working day to entitle them to a higher wage. We agree with the court in *Brennan* v. *Prince William Hospital Corp., supra,* at 286, that "[h]igher pay is not related to extra duties when . . . [t]he extra task consumes a minimal amount of time and is of peripheral importance."

POST-MORTEM TASKS

The district court found that:

> [a]n unpleasant task at the hospital is post-mortem care. This is done by aides and orderlies; but because the hospital has many more aides than orderlies, this unpleasant duty falls much more frequently upon the

BLEED THROUGH

> typical orderly, than the typical aide . . . The orderly performs all post-mortems on the male deceased patients; and the aides share in turn the post-mortem care upon deceased female patients.

The evidence indicates, that, as a general rule, orderlies did post-mortem work on deceased males and aides on deceased females. Since aides outnumbered orderlies six to one, it would appear that orderlies were likely to perform more post-mortems than aides. However, none of the orderlies who testified indicated that he had ever done post-mortem work. Moreover, Elizabeth Wilhite testified that although she performed post-mortems, she, like other aides, also assisted orderlies in doing post-mortems and that she usually performed only one post-mortem each month.

Despite the paucity of evidence presented concerning the division of post-mortem tasks between aides and orderlies, it is clear that both did such work. The evidence does not support the district court's finding that there was always a division of post-mortem procedures based upon the sex of the deceased. Accordingly, we conclude that any greater frequency with which orderlies may have performed this work does not support a determination that for this reason the job of orderly required greater skill, effort, or responsibility, or was performed under different working conditions. "Disproportionate frequency in the performance of the same routine tasks does not make the job unequal." *Brennan* v. *Prince William Hospital Corp., supra,* at 287, citing 29 C.F.R. § 800.123 (1973).

On the basis of the evidence that we have already discussed, we hold that the general finding of fact made by the district court that a

> typical orderly . . . spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing

> TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects

is clearly erroneous. In fact, some orderlies performed no sterile procedures at all and the "typical" orderly spent little time lifting heavy patients, setting up traction, handling unruly patients, responding to stat calls, and lifting oxygen tanks and other heavy objects. Indeed, none of the orderlies who testified indicated that he had ever carried an oxygen tank from the hospital basement or had changed a TUR dressing.

Although the district court determined that aides spent substantially all of their working time in "routine patient care," the record demonstrates that this *routine* care included performing sterile procedures, particularly catheterizations, catheter irrigation, bladder installation and irrigation; lifting heavy patients; caring for violent and potentially violent patients; and answering emergency calls in the form of patient lights. Moreover, the record demonstrates that some aides transported oxygen tanks from the hospital basement and set up traction.

Orderlies also were required to perform "routine" tasks. For example, Denford Morris, who was assigned to two stations of the third floor of the hospital on the seven a.m. to three p.m. shift, testified that his first task each morning was to ascertain what linen was needed on the third floor that day, to bring it from the basement, and to distribute it in appropriate closets on the third floor. This task required no special skill, effort, or responsibility. Then he took the eight a.m. rectal temperatures of the male patients on his two stations and performed a number of other nursing duties including giving enemas, irrigating catheters, inserting

BLEED THROUGH

catheters, giving sitz baths, finishing baths on male patients, walking patients, inserting suppositories, taking eleven a.m. temperatures and helping to distribute lunch trays. Kenneth Thomasson, a former orderly, testified that he made six or seven beds each day when he worked on the morning shift.

On the afternoon shift, the evidence indicates that neither aides nor orderlies were required to bathe patients or change beds unless a patient was discharged from the hospital or had soiled his bed. If a male patient soiled his bed, an orderly had the responsibility of cleaning up, and if the patient were female, an aide did. Aides took temperatures and blood pressures, assisted patients to the bathroom, reinforced dressings, irrigated bladders, performed sterile soaks for cataract patients, regularly turned patients and got them out of bed, distributed dinner trays, prepared patients for surgery, and until October, 1972, inserted catheters. All of these duties, with the exception of distributing dinner trays, were performed for male patients by orderlies.

Aides and orderlies on the night shift did not generally perform scheduled nursing procedures, but spent most of their time attending to the specific needs of patients by, for example, answering calls, helping them out of bed and assisting them to the bathroom. Both also performed assigned duties, including, for example, inserting catheters, giving douches, unstopping catheters to take tests, and clamping catheters off.

The record demonstrates that at least those aides who were trained to, and did perform sterile procedures, fulfilled duties that required skill, effort and responsibility substantially equal to that required by orderlies, and performed them under substantially identical working conditions. In making this determination, we observe that the district court made no finding and, indeed, could not make

a finding on the record before him, that the duties that in his view distinguished the job of orderly from that of aide were performed by *all* orderlies. Nor did he find that the orderlies who did perform them did so with sufficient frequency to justify a higher wage. In fact, we are unable to find any evidence that any orderly performed any duty not also performed by an aide with three legally insignificant exceptions: (1) the transportation of linen from the basement; (2) the infrequent removal of casts; and (3) the duty of responding to "stat" calls. The first exception requires no special skill, effort, or responsibility and does not justify the higher wages paid to orderlies. The second, was apparently performed only once during a four or five year period by a "typical" orderly. In order to justify higher wages, this duty would have to be performed with some regularity and would have to consume a substantial portion of an orderly's work day. The third, is not only an infrequent duty, but it is also not essentially different from the aide's corresponding duty of responding to patient lights.

Our interpretation of the Equal Pay Act corresponds to that of the agency charged with its enforcement. Although agency interpretation is not controlling,[13] it is entitled to great weight, and in this instance we find it well-reasoned and persuasive. In 29 C.F.R. § 800.128 (1974), the Secretary of Labor has promulgated an interpretive bulletin providing that:

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[13]In 29 U.S.C. §206(d), Congress did not authorize the Secretary of Labor to promulgate binding regulations, and the bulletin with which we are concerned appears in 29 C.F.R. Subchapter B, entitled "STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS." However, when the Secretary's interpretation of the Act does not contravene the intent of Congress, it is entitled to great deference *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433-34 (1971), *Brennan* v. *City Stores, Inc.*, 479 F. 2d 235 (5th Cir. 1973). *See also Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

BLEED THROUGH

> . . . the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort . . . . [However,] a wage differential might be justified [if] . . . the extra effort so expended is substantial and is performed over a considerable portion of the work cycle.

This construction has been consistently adopted by courts in interpreting the equal pay provisions of the Fair Labor Standards Act. *E.g., Shultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356 (8th Cir. 1970); *Hodgson* v. *Montana State Board of Education*, 336 F. Supp. 524 (D. Mont. 1972). *See also Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3d Cir. 1970), *cert. denied*, 398 U. S. 905 (1970), *on remand*, 319 F. Supp. 229 (1970). In *American Can Co.*, the court held that males who performed substantially the same work as females but in addition thereto spent from 2 to 7% of their work day doing heavy lifting were not entitled to wages higher than those paid to the females. In the *Montana State Board of Education* case, the court found that the employer violated the Equal Pay Act when it paid female housekeepers wages lower than those paid to male custodians, even though both groups spent the predominant part of their work days engaged

> "in routine custodial duties consisting of sweeping, mopping, washing, scrubbing, dusting, and cleaning of bathrooms . . . [because the] so-called 'extra duties' performed by the . . . men either took only minutes per day or per week, or [were] also performed by the women . . . ." 336 F. Supp. at 525.

In the *Wheaton Glass* case, the court found that even if all male selector-packers performed all 16 additional tasks that their employer stated consumed 18% of their working

day, because the additional tasks were not shown to be of greater economic value than those performed by females, they did not justify payment of higher wages to the male selector-packers than to the females.

The cases challenging differentials between wages paid to hospital orderlies and aides have applied the principle that differences between duties must be substantial in terms of effort required, and time devoted. In the cases where the wage differences were upheld, the evidence demonstrated that orderlies regularly performed duties that aides were not required to perform, and that the orderlies were required to employ either greater skill, effort or responsibility than the aides. *E.g., Hodgson* v. *Golden Isles Convalescent Homes, Inc., supra,* and *Hodgson* v. *Good Shepard Hospital,* 327 F. Supp. 143 (E.D. Tex. 1971).[14]

In *Golden Isles Convalescent Homes,* the hospital employed one to four orderlies who performed a number of tasks not performed by its thirty to forty aides, including the insertion of catheters for male patients, total lifting, irrigation, setting up traction, the pursuit of missing patients, the driving of patients, setting up oxygen tanks, and "floating" throughout the hospital. The court of appeals expressly rejected the contention that the record demonstrated that "these duties were performed by aides, that they did not differ greatly from aides' other duties, and that they were performed too infrequently to justify a coclusion that the work was unequal." 468 F. 2d 1157.

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[14]See also *Shultz* v. *Royal Glades, Inc.,* 66 CCH Lab Cas. ¶32,548 (S.D. Fla. 1971), where the court, in rejecting a challenge under the Equal Pay Act, found that orderlies spent 50 to 60 percent of their time lifting patients who were too heavy for a single aide; 20 percent of their time lifting heavy patients for aides upon request; and procured heavy oxygen tanks, carried patients' luggage, and cared for difficult-to-handle patients. In addition, orderlies, unlike aides, were required to work split shifts from 6:00 a.m. to 1:00 p.m. and then from 5:00 p.m. to 8:00 p.m.

BLEED THROUGH

In the *Good Shepard Hospital* case, the district court found that orderlies performed a number of tasks not performed by aides including assisting the orthopedic surgeon, catheterizations, and emergency room work; that they, unlike aides, were responsible for the security and protection of hospital personnel, patients and visitors, for the restraint of patients in the hospital's lock-up rooms, and for fire and disaster drills; that they, unlike aides, were not assigned to particular floors but performed hospital-wide services and were required to respond to emergency calls; and that they spent up to twenty-five per cent of their working day doing heavy lifting and loading, and in ambulating patients.

In contrast, in the cases in which courts have invalidated separate wage scales for aides and orderlies, the evidence demonstrated that both performed substantially equal work, and that any differences in the duties did not justify higher wage rates for males. *E.g., Hodgson* v. *Brookhaven General Hospital,* 470 F. 2d 729 (5th Cir. 1972); *Hodgson* v. *Maison Miramon, Inc.,* 344 F. Supp. 843 (E.D. La. 1972); *Hodgson* v. *George W. Hubbard Hospital of Meharry Medical College, Inc.,* 351 F. Supp. 1295 (M.D. Tenn. 1971).

In the *Meharry Medical College* case, the court, in awarding back pay to nurse aides, rejected the hospital's assertions that higher wages to males were justified because male "nurse attendants" performed additional duties including mopping floors, transporting bodies to the morgue, assisting undertakers in the release of bodies from the morgue, moving helpless patients in and out of bed, transporting large gas cylinders, delivering heavy supplies to the wards, changing mattresses, trasporting stretcher patients, and carrying out temporary emergency duties in areas of the hospital other than the station to which they were assigned. Instead, the court found, that aides and orderlies assisted each other in these tasks, and that emergencies requiring special efforts by orderlies alone arose only occasionally.

In the *Maison Miramon* case, *supra*, the district court found that the defendant nursing home had violated the Equal Pay Act by paying higher wages to orderlies than were paid to aides when both

> . . . are generally responsible for the personal care and comfort of the Greenbriar patients and are usually assigned to the care of female and male patients, respectively. The basic duties of each include the feeding of patients, brushing and combing their hair; making beds; changing, turning, and lifting patients; securing and emptying bed pans; and assisting patients in and out of bed. When needed, and as available, the aides and orderlies assist each other. 344 F. Supp. 845.

In *Brookhaven Hospital, supra*, the court of appeals reversed the initial decision of the district court finding a violation of the Equal Pay Act. In seeking reversal, the hospital contended that although aides and orderlies were primarily responsible for the routine care of patients assigned to them,

> . . . orderlies were frequently called upon to perform general hospital duties which aides were rarely called upon to perform—duties requiring more than routine skill (catheterizations), effort (lifting heavy patients, bringing in stretcher patients, setting up traction, helping in the application of heavy casts, subduing violent patients, holding patients down in uncomfortable positions during spinal taps, moving TV sets and other heavy equipment, assisting in the emergency room, bringing up supplies), and responsibility (maintaining hospital security and preparing to assume leadership in the event of a fire). 436 F. 2d at 723.

The court of appeals remanded to the district court for specific findings of fact whether these additional tasks re-

BLEED THROUGH

quired 1) extra effort, 2) a significant amount of the time of all orderlies, and 3) were of an economic value commensurate with the pay differential. The district court found the jobs of orderlies and aides required an equality of effort, and the court of appeals affirmed. It held that "the record supports the affirmative statement that orderlies and aides expended substantially equal effort in performing all of their duties, however divided and ranked." 470 F. 2d 730.

Finally, in *Brennan* v. *Prince William Hospital Corp., supra,* the court reversed a judgment for the hospital entered after trial because it determined, as we do in this case, that the district court misapprehended the standard to be applied in cases alleging violation of the Equal Pay Act. In its opinion, the court held that the higher wages paid to orderlies were not related to additional duties assigned to them, because some orderlies received the higher wages without performing these duties, because some of the additional duties (restraining patients, providing physical security) were performed only infrequently, because aides performed some of the same tasks (heavy lifting, restraining patients), and because some of the additional duties required no extra skill, effort or responsibility (heavy lifting, "floating").

In the appeal before us, the district court did find that the duties of orderlies required greater skill, effort and responsibility. This legal conclusion is, however, based both upon findings of fact that we have held are clearly erroneous and also upon an incorrect interpretation of the Equal Pay Act. Appellant has demonstrated that the aides who performed sterile procedures through October 1, 1972, were required to have substantially the same skill, to exert substantially the same effort, and to assume substantially the same responsibilities under identical working conditions as orderlies. Therefore, these aides are entitled to the same

wages as orderlies for that period unless appellees can demonstrate on remand that the higher wages paid to orderlies were based on a factor other than sex.

This determination, however, does not terminate this litigation, because appellees are entitled to an opportunity to rebut the Secretary's prima facie case, and to show that a factor other than sex including, for example, "(i) a seniority system; (ii) a merit sytem; [or] (iii) a system which measures earnings by quantity or quality of production," 29 U.S.C. §206(d)(1), explains the differential in wages paid to aides and orderlies.[15] In remanding this case to the district court for further proceedings, we observe that the burden of proving that a factor other than sex is the basis for a wage differential is a heavy one. We agree with the Secretary that "unless the factor of sex provides no part of the basis for the wage differential," the requirements for an exception are not met. 29 C.F.R. 800.142 (1974). This standard was adopted in *Hodgson* v. *Security National Bank*, 460 F. 2d 57 (8th Cir. 1972), where the court found that no bona fide management training program existed that would justify paying male bank tellers wages higher than those paid to female bank tellers, and rejected the bank's unsubstantial generalization that "wo-

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[15]The enumerated exceptions to the rule requiring equal pay for substantially equal work are affirmative defenses. *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196 (1974).

Even before the Supreme Court's decision federal courts uniformly treated the enumerated exceptions as affirmative defenses, which need not be anticipated by the Secretary. *E.g., Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (5th Cir. 1970), *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3d Cir.), *cert. denied*, 398 U. S. 905 (1970). As the district court pointed out in *Wirtz* v. *Wheaton Glass Co.*, 284 F. Supp. 23, 33 (D. N.J. 1968), *rev'd on other grounds sub. nom. Shultz* v. *Wheaton Glass Co., supra*, ". . . in the Upper House, the Chairman of the Senate Subcommittee, who guided the Bill through that body, declared that an employer who interposes a defense of exception to coverage assumes the burden of proving that it comes within the exception provisions of the Act."

BLEED THROUGH

men characteristically had been uninterested in management positions." 460 F. 2d 60.

Other courts have also rejected an asserted defense based on preconceived notions of what constitutes "women's work" and "men's work." In *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490 (4th Cir. 1972) the court, in reversing a judgment for the employer, found that the Secretary of Labor had sustained his burden of proving that the jobs performed by the company's single male employee and the three female employees at its stock desk required substantially equal skill, effort and responsibility and that the sixteen additional tasks performed by the male did not justify paying him a higher wage. In addition, the court refused to recognize "a training program coterminous with a stereotyped province called 'man's work' as a factor other than sex." 454 F. 2d 498.

Moreover, although a bona fide job classification program that does not discriminate on the basis of sex is a defense to a charge of discrimination, H.R. Rep. No. 309 (1963), 1963 U. S. Code Cong. and Admin. News 687,689, on remand, consideration should be accorded to the hospital's own job descriptions. It admitted at trial that it had never hired a woman for the position of orderly because no woman had ever applied for the position. However, the hospital's own description of the two jobs, for "nurse assistant" and for "male nursing assistant," as an orderly is formally designated, may evidence an official hospital policy against hiring women as orderlies. In making this observation, of course, we do not intend to encroach upon the responsibility of counsel or upon the province of the district court.

Because of the errors heretofore pointed out, including the dismissal of the complaint at the close of appellant's evidence, the judgment of the district court is reversed and the cause is remanded for further proceedings.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 2595

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor - - *Plaintiff*

v.

OWENSBORO-DAVIESS COUNTY HOSPITAL, a Corporation - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—Entered December 18, 1972

This matter came before the Court without the intervention of a jury, and after the plaintiff had completed the presentation of its evidence, the defendants, without waiving their right to offer evidence in the event the motion was not granted, moved for a dismissal pursuant to Rule 41(b) on the ground that upon the facts and the law the plaintiff had shown no right to relief. The Court sustained the motion of the defendants, directed judgment against the plaintiff, and pursuant to Rule 52(a) the Court finds the facts specially and states its conclusions of law, as follows:

BLEED THROUGH

FINDINGS OF FACT

(1) This action was instituted by the Secretary of Labor, United States Department of Labor, on September 20, 1971 against the Hospital Defendant, and amended to include the City and County Defendants, seeking to enjoin the defendants from violating the provisions of Section 15(a)(2) and 6(d) of the Fair Labor Standards Act of 1938, as amended, and to restrain the defendants from any withholding of payment of wages found to be due under the Act.

(2) Jurisdiction is conferred upon the Court by Section 17 of the Act.

(3) The Hospital is a non-profit Kentucky corporation, located at 1101 Pearl Street, Owensboro, Daviess County, Kentucky, within the jurisdiction of this Court, and is operated by the City of Owensboro and the County of Daviess through a duly appointed Board of Managers.

(4) It was stipulated that the defendant is an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act, and thus the employees of the Hospital are entitled to the benefits of the Act by virtue of their employment by the enterprise.

(5) At the commencement of the trial, the parties agreed by counsel that the issue to be determined by the Court was whether or not there had been discrimination on the basis of sex between aides and orderlies employed by the Hospital, and that if such discrimination were found that it would not be difficult to determine the amount of pay due to the aides, and that in such event the parties would reach agreement on such amount, and failing the same that evidence as to the amount of such pay would be the subject of a subsequent hearing.

(6) The period covered by this action, by agreement of the parties, and based upon the Complaint, is from April 5, 1968, to the date of trial on October 31, 1972.

(7) This case proceeded to trial solely on the issues of whether or not the Defendant Hospital had violated the equal pay provisions of the Act contained in Section 6(d). The facts found in regard to this part of the cause follow.

(8) Involved in this case is the job of Male Nursing Assistant, usually called Orderlies, and the job of Nurse Assistant, usually called Aides. The discrimination charged is not limited to any department of the Hospital.

(9) The job descriptions for an Orderly, and for an Aide, reflect substantial differences in duties, and these differences exist in the actual duties performed.

(10) The typical aide spends substantially all of her time at the hospital in routine patient care, requiring nominal skills, such as giving baths to patients, making beds, serving and picking up food trays, feeding patients, making errands to perform small services and answer requests for small personal needs.

(11) The typical orderly spends a very small part of his working time in the routine patient care such as set forth in finding No. 10; but spends substantially all of his working time in performing Sterile Techniques, including catheterizations, lifting heavy patients, changing TUR dressing, setting up Tractions, handling or controlling violent or alcoholic patients, answering emergency calls (referred to as Stat calls), and doing heavy lifting of oxygen tanks, orthopedic and bedfast patients, and other objects.

(12) The duties of the orderly as set forth are separate and distinct from the duties of the aide, and require a greater skill, effort, and responsibility, and are performed under less attractive working conditions, than the duties of the aides.

(13) At all times, orderlies have been trained in Sterile Techniques, which requires substantial skill, and includes catheterization, catheter irrigation, rectal suppositories, TUR dressing change, and bladder irrigation. Since Octo-

BLEED THROUGH

ber of 1968, aides have received no training in Sterile Techniques. A typical orderly, in a typical day, would perform from five to seven catheter irrigations varying from five minutes to 45 minutes each, and would perform a catheterization upon a male patient five or six times in a day, requiring twenty-five to thirty-five minutes each. These are skilled procedures. Almost all catheter irrigations and catheterizations upon male patients are performed by orderlies. Upon female patients almost all of these procedures are performed by Registered Nurses or Licensed Practical Nurses, and very rarely, if ever, by aides.

(14) Throughout the hospital, but particularly in the orthopedic section, the typical orderly exercises the skill of cutting a cast where the physician has directed, and the orderly is trained by the physician to do this. There is no evidence that the aide is trained at all to do this, or ever performs this function. The cutting of casts requires a different and additional skill by the orderly.

(15) The typical aide is assigned to a fixed number of patient rooms, and number of patients therein, at an assigned duty station. The typical orderly is not assigned to any one duty station, or even to one certain floor, but is required to answer calls throughout the hospital, known as Stat calls, many of which arise from emergencies. The orderly is free from supervision and must exercise discretion and decision making in determining whether to respond and go to a call at another location, or to continue the performance of the duty upon which he is then engaged. The Stat calls frequently require the orderly to hurry to meet an emergency, upon which not infrequently life itself depends.

(16) Substantially all of the duties of the aides are under the direct supervision of a licensed practical nurse (LPN) or a registered nurse (RN). A very small part of the duties of the orderlies is performed under direct supervision from anyone.

(17) When traction is required to be set up in the hospital, the typical orderly assigned must know the various types of traction, and how to set up the apparatus, and routinely perform this function. The aide may from time to time take a patient in or out of traction, add or remove weights; but does not have the knowledge or exercise the skill just described for the orderly. In addition to the skill, the setting up of traction requires the lifting of heavy weights and requires substantial exertion by the orderly.

(18) The hospital has two rooms for violent patients, and these rooms are almost always in use. In addition, the hospital from time to time has alcoholic, narcotic, and other patients who are not routinely safe to themselves or other patients or personnel. The orderly has the responsibility for almost all care to those patients, which is performed under a less satisfactory working condition.

(19) An unpleasant task at the hospital is post-mortem care. This is done by the aides and orderlies; but because the hospital has many more aides than orderlies, this unpleasant duty falls much more frequently upon the typical orderly, than the typical aide. For example, upon the orthopedic station, there are a total of eight aides on the day shift, six on the evening, and only one orderly. The orderly performs all post-mortems on the male deceased patients; and the aides share in turn the post-mortem care upon deceased female patients.

(20) Each aide assigned to patient care spends several hours daily in making beds, assisting ambulatory patients to bathe, serving and picking up food trays, answering the room lights for patient requests, and taking temperature, blood pressure, and pulse readings of the patients. These duties require no special skills. Most of the orderlies spend either no time, or a very little time in these duties, making the jobs of aide and orderly substantially different.

(21) The work of the orderlies is continuous, demanding, and tiring, and the emergency calls are frequently hard

BLEED THROUGH

on the nerves of the orderly. The orderly has very little time for rest or relaxation during his working time. The aides perform their work under much less tension and strain, and have more opportunity for rest and relaxation during the work day.

(22) The work of the orderly is arduous and requires more physical effort and strength than the work of the aides.

CONCLUSIONS OF LAW

The Court concludes that:

(1) This Court has jurisdiction of the parties and the subject matter of this action.

(2) The plaintiff has failed to meet its burden of proof to establish that the tasks performed by the Orderlies and the Aides are substantially equal. The variation in pay, if any, is not the result of any discrimination upon the basis of sex. See *Hodgson* v. *The Good Shepherd Hospital,* 19 WH Cases 1067, 65 L.C. Par. 32,500 (Tex. 1971) 327 F. Supp. 143, and *Hodgson* v. *William & Mary Nursing Hotel,* 20 WH Cases 10, 65 L.C. Par. 32,497 (Fla. 1971).

(3) At the Owensboro-Daviess County Hospital there is no discrimination between employees on the basis of sex by paying the male orderlies wages at a higher hourly rate than that paid to female aides, because the work performed by orderlies involves substantially a different type of work, requiring different skills, greater training, greater effort and responsibility, greater physical effort and strength, and is performed with substantially less supervision than the work performed by the aides.

(4) The defendants have not violated Section 6(d) and Section 15(a)(2) of the Fair Labor Standards Act, as amended.

(5) The motion of plaintiff for a Permanent Injunction is denied on its merits.

(6) The motion of defendants to dismiss the action pursuant to Rule 41(b) is sustained, and the Complaint is dismissed with prejudice.

JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff take nothing herein, and this action is dismissed with prejudice on its merits, at the plaintiff's costs.
December 15, 1972

(s) James F. Gordon
United States District Judge

Copies to:
Counsel of record.

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief were mailed by First Class Mail, postage prepaid, to Hon. Donald S. Shire, Deputy Associate Solicitor, U. S. Department of Labor, Room 4141 Main Labor, 14th and Constitution Avenue, N.W., Washington, D.C. 20210, attorney for the Respondent, to Solicitor General, Department of Justice, Washington, D.C. 20530 and to Ronald M. Sullivan, 100 St. Ann Building, Owensboro, Kentucky 42301, Attorney for Petitioners, this 2 day of March, 1976.

J. Larry Cashen

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1211

OWENSBORO-DAVIESS COUNTY HOSPITAL, ET AL., PETITIONERS

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 523 F.2d 1013. The findings of fact and conclusions of law of the district court (Pet. App. 35a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1975. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on December 2, 1975. The petition for a writ of certiorari was filed on February 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether female aides and male orderlies who assist the nursing staff at petitioners' hospital perform work that is "equal" within the meaning of the Equal Pay Act of 1963.

STATUTE INVOLVED

Section 3 of the Equal Pay Act of 1963, 77 Stat. 56, an amendment to the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended, 29 U.S.C. 206(d), is set forth in relevant part at Pet. 4.

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Western District of Kentucky to enjoin petitioners Owensboro-Daviess County Hospital, the City of Owensboro, and the County of Daviess from violating Section 3 of the Equal Pay Act of 1963, 29 U.S.C. 206(d), by paying female nursing aides at the hospital less than male orderlies for substantially equal work. Petitioner[1] denied that the aides and orderlies performed equal work, claiming that the orderlies' duties required greater skill, effort and responsibility. At the close of the Secretary's evidence, the district court, *sua sponte*, entered judgment for petitioner (Pet. App. 3a). The court of appeals reversed and remanded the case for further proceedings, concluding that several of the district court's critical findings of fact were clearly erroneous (Pet. App. 4a). The petition for a writ of certiorari seeks review of that remand order.

The evidence at trial showed that, during the period covered by this action, petitioner employed 30 to 40 male nursing assistants (orderlies) and 160 to 180 female nursing assistants (aides) and that the orderlies were paid

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[1]"Petitioner" hereinafter refers to Owensboro-Daviess County Hospital.

BLEED THROUGH

approximately 25 cents per hour more than aides with comparable experience (Pet. App. 6a; A. 91).[2] It was undisputed that aides and orderlies attended the same four-week training course and, with one exception,[3] received identical instruction (Pet. App. 5a; A. 301-302) and that they performed the same basic patient care duties, except to the extent that their duties differed because of shift assignments (Pet. App. 25a-27a; A. 97-100, 297-299).

The routine duties common to both aides and orderlies included taking vital signs (oral and rectal temperatures, pulse, respiration and blood pressure); measuring and recording the patient's intake and output; preparing patients for surgery; bringing and emptying bed pans; collecting specimens; assisting male patients with urinals; assisting with the admission, transfer and discharge of patients, and orienting the patient to hospital surroundings; discontinuing subcutaneous and intravenous injections under the supervision of a nurse; giving baths, enemas, and post mortem care; weighing patients; applying dressings, compresses, hot water bottles and ice bags; cleaning incontinent patients; performing clinitests and

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[2]"A." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court. The wage differential varied from 20 to 25 cents per hour and was only 15 cents for aides and orderlies with less than three months' experience.

[3]Aides hired after October 1968 received no training in catheterization procedures. Prior to that time, they were trained to catheterize female patients (A. 100, 106, 123, 126, 168-169, 242-243, 273-274) and the aides, most of whom were hired prior to October 1968 (A. 279-280), continued to perform this duty until instructed otherwise on October 1, 1972—four weeks before trial (A. 109-114, 126, 145-146, 152-153, 160, 221, 242-243, 264-265, 286-287). Significantly, aides were paid 20 and 25 cents per hour less than orderlies before as well as after October 1968 (A. 91).

acetests; reporting observations and patient complaints to the nurse; assisting patients in getting into and out of bed; turning patients; irrigating bladders; reinforcing dressings; performing sterile soaks for cataract patients; unstopping catheters to take clinney and urine tests; answering signal lights; assisting with oxygen therapy; cleaning equipment; performing housekeeping chores; and (until October 1972) inserting catheters (A. 72-94, 99-101, 108-116, 118, 121-122, 126, 129, 141-143, 145-147, 150-151, 161-162, 172-179, 191, 200-202, 219-224, 226, 228-230, 243-246, 254-255, 269-270, 274, 276-277, 280-281, 284-287, 293-294). Aides also gave douches and perineal care (A. 82), made beds each morning, served meal trays, and assisted with feeding patients (A. 140, 156, 217-219); orderlies also made beds after patients had been discharged and for patients in orthopedics (A. 195, 237-242, 249), changed bedding for incontinent male patients (A. 212), and performed catheterizations.[4]

Although the job descriptions indicated that orderlies, but not aides, were required to perform sterile procedures, lift heavy patients, set up traction, cut casts, restrain unruly patients and move heavy oxygen tanks, the evidence clearly indicated that aides performed these or similar tasks with some frequency and that many orderlies had not performed these functions with any regularity. For exam-

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[4]The six orderlies assigned to X-Ray, Physical Therapy and Central Supply performed no catheterizations or other sterile procedures (A. 43-44, 47-48). Although the trial court found that an orderly typically inserted 5 to 6 catheters a day, there is nothing in the record to support that conclusion. Only one orderly testified as to the number of catheterizations personally performed (A. 176) and, as the court of appeals noted (Pet. App. 12a), that witness "contradicted himself not only about the number of * * * catheterizations he performed each day, but also about the length of time it took him to perform them." See A. 177-179.

BLEED THROUGH

ple, aides normally performed sterile procedures (such as bladder irrigations, eye soaks, and dressing changes); did catheterizations until October 1972; assisted with heavy patients (Pet. App. 13a; A. 120, 141, 226-227, 258); helped to restrain violent and unruly patients (Pet. App. 23a-24a; A. 129-130, 136, 143-144, 183, 258, 269-270); carried oxygen tanks from the basement when necessary (Pet. App. 22a; A. 147-148, 204, 250-251, 257-258, 288); set up and adjusted traction and assisted orderlies in these procedures (Pet. App. 19a-22a; A. 128, 136-137, 180-181, 196-198, 224-225, 231-234, 266); and answered signal calls from patients, which serve a function similar to the "stat" (emergency) calls to which orderlies must respond (A. 124, 135-136, 290-293).

ARGUMENT

The decision below is correct, is in accord with the decisions of other courts, and presents an essentially factual question not warranting review by this Court.

1. The court of appeals correctly concluded that the district court erred in dismissing the Secretary's complaint,[5] since "it is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable * * *." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203, n. 24. It is sufficient if the jobs are closely related, require substantially "equal skill, effort and responsibility," and are performed under "similar working conditions." See *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 238 (C.A. 5); *Hodgson* v. *Miller Brewing Co.*, 457

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[5]Contrary to petitioner's contention (Pet. 21), the court of appeals did not exceed its powers in determining that several of the district court's findings of fact were clearly erroneous and that the district court had applied an improper standard of "equal work." See Fed. R. Civ. P. 52(a); *Baumgartner* v. *United States*, 322 U.S. 665, 671; *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 199, 201.

F. 2d 221, 227 (C.A. 7); *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (C.A. 4); *Shultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356, 360 (C.A. 8); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 265 (C.A. 3), certiorari denied, 398 U.S. 905.

As the evidence outlined above indicates, the aides and orderlies employed by petitioner performed essentially identical routine tasks, depending on the shift to which they were assigned (Pet. App. 25a-28a).[6] Moreover, the few duties not performed by any aide — *e.g.*, the transportation of linen from the basement, the occasional removal of casts, and the duty to answer "stat" calls — were insufficient to render the jobs unequal for purposes of the Act either because they "require[d] no special skill, effort, or responsibility" (Pet. App. 27a), were performed infrequently (Pet. App. 27a-28a), or were essentially no different from corresponding duties performed only by aides (Pet. App. 28a). See *Brennan* v. *Prince William Hospital Corp.*, 503 F. 2d 282 (C.A. 4), certiorari denied, 420 U.S. 972; *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1050 (C.A. 5), certiorari denied, 414 U.S. 822; *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, 234 (C.A. 2), affirmed, 417 U.S. 188.

2. Petitioner contends (Pet. 19), however, that the decision below and similar rulings by other courts of appeals are based upon a "misinterpretation of the legislative history" of the Equal Pay Act and that that history shows that Congress, when it required equal pay for "equal work," intended the word "equal" to mean "substantially identical." To the contrary, we submit that

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[6]Contrary to *amicus*' assertion (Br. 13), the court of appeals specifically considered whether the two jobs involved substantially the same duties (Pet. App. 27a-28a).

BLEED THROUGH

the court of appeals properly interpreted the legislative history as reflecting an intention to provide equal pay for men and women as long as their work was "substantially" equal, and that petitioner's interpretation "would destroy the remedial purpose of the Act." *Shultz* v. *Wheaton Glass Co., supra,* 421 F. 2d at 265.

Congress intended the equal pay provisions to apply where men and women are employed in the same or closely related jobs and do "substantially the same work" (Hearings on the Equal Pay Act, H.R. 3861 and Related Bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., p. 240 (1963)). Thus, after noting that portions of the House debates would support the interpretation that only "identical" jobs were covered, Senator McNamara, Chairman of the Senate Labor Subcommittee and sponsor of the Senate bill, stated "[I]t is most important that the Senate intent be made clear as to language in the bill which is the same in both Senate and House versions," since "[t]he discussion that surrounded the congressional consideration of this bill has somewhat clouded the question of the definition of 'equal skills, efforts, and responsibilities' " (109 Cong. Rec. 9761 (1963)). Senator McNamara remarked that the Senate Report contained "a rather lengthy discussion * * * on the methods and procedures which the Department should utilize to determine which jobs do involve equal skills, efforts and responsibilities and that the Report thus "makes it clear that it is not the intent of the Senate that jobs must be identical. * * * Based on some of the discussion which has taken place, these jobs [which involve equal skills, efforts and responsibilities] would not be considered equal because they are not identical, and such a conclusion would be obviously ridiculous" (*ibid.*).

Petitioner argues (Pet. 17-18) that this clear explanation by one of the bill's sponsors, together with the entire Senate debate, must be disregarded because the Senate bill was "scrapped" for "an entirely different * * * House-passed bill" (Pet. 18). This is incorrect. S. 1409, the bill that passed the Senate, and H.R. 6060, whose text was substituted for it by the House, are virtually identical. The only differences between the two bills (set forth in full at 109 Cong. Rec. 9217-9218 (1963)) are on matters irrelevant to the issues in this case.[7] In accepting the House version, the Senate was not "capitulating", as petitioner suggests (Pet. 18), but simply agreeing to it. Indeed, the remarks of Senator McNamara are entitled to added significance in view of the "conflicting statements" of the House sponsors of the bill. *Corning Glass Works* v. *Brennan*, *supra*, 417 U.S. at 197-198.

3. Contrary to petitioner's contention (Pet. 12-16), the decision below does not conflict with *Hodgson* v. *Golden Isles Nursing Convalescent Homes, Inc.*, 468 F. 2d 1256 (C.A. 5), on the issue whether female aides and male orderlies perform equal work. In *Golden Isles*, which involved a geriatric nursing home rather than a hospital, the court held that, on the facts of that particular case, male orderlies did not perform work that was substantially equal to that of female aides. The dissimilar results in *Golden Isles* and the present case reflect solely the differences between the particular functions performed

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[7] Section 3 of the House substitute added language forbidding union attempts to cause an employer to violate the Act. It also stated that pay differentials caused by a merit, seniority, or piecework system do not violate the Act. The Senate bill contained a general section, retained in the House version, permitting any differential "based on any factor * * * other than sex."

by the male and female attendants in the two cases. Indeed, in its subsequent decision in *Hodgson* v. *Brookhaven General Hospital*, 470 F. 2d 729, holding that male orderlies and female aides performed substantially equal work and were entitled to equal pay, the Fifth Circuit distinguished its *Golden Isles* decision on that factual ground.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.